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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOUIS PERAINO,
BRYANSTON DISTRIBUTORS, INC., and
GERARD DAMIANO FILM PRODUCTS, INC.
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners have been convicted in the United States District Court for the Western District of Tennessee, Western Division, [hereinafter, "Memphis"]* of conspiracy to violate the Federal obscenity statutes, 18 U.S.C. §1462 and §1465 by transporting the film, "Deep Throat," in interstate commerce.

The theory of the indictment (App., F, p.37a, *infra*) was that anyone associated with the production or distribution, anywhere, of that film, was a member of a single conspiracy which was prosecutable in Memphis. Three years after the creation of the film, it was transported to Memphis by a film distributor, other than the petitioners, and was shown there for a month, until it was closed down by local authorities.

*We shall, hereinafter, treat "Memphis" as being synonymous with the Western District of Tennessee since that city was the only place within the Western District in which it was alleged that the film was exhibited.

1. Did the conviction of petitioners violate the community standard protection conferred by the First Amendment of the United States Constitution?

a) In a First Amendment case, may the criminal conspiracy theory be utilized to confer jurisdiction upon a community to prosecute anyone who has distributed an allegedly obscene film anywhere in the United States, even though such persons have not been shown to have participated in a decision to distribute the film into the community in question?

b) If the production and distribution, elsewhere, of a possibly obscene work, may be prosecuted according to the community standards of any community into which other persons may subsequently distribute that work, then does not such a community become the ultimate arbiter of standards for the entire nation? Must such a result be rejected because it violates the very concept of community standards which this Court has held is an essential ingredient of the First Amendment?

c) Was the trial Court in error when it instructed the jury that the petitioners were to be tried according to the community standards of Memphis, rather than the standards which existed in those communities to which the petitioners confined their distribution of the film?

d) In view of the diverse community standards inherent in a "national" obscenity prosecution, was the indictment invalid since, in fact, it charged multiple conspiracies?

2. Was the indictment invalid because the Grand Jury never viewed the film, and because no evidence exists that the film was ever described to them, other than the hearing testimony of the Grand Jury foreman, who, several years

after the indictment recalled that: a) he had privately seen the film prior to being summoned for Grand Jury service, and that, b) an unidentified FBI agent had summarized the film for the Grand Jurors.

3. Did the Government fail to establish that the motion picture in this case was obscene, and did the Court err in permitting prejudicial government evidence on that issue and in refusing to receive relevent defense evidence on that issue?

a) Was the absence of obscenity established by the countless millions of persons who viewed the film and by the testimony of defense experts?

b) Did the Court err in permitting the Government to elicit proof that this film might have harmful effects upon some members of the population.

c) Did the Court err in refusing to receive in evidence certain educational slides which were regularly used in Memphis, and which depict activities which are comparable to those depicted in the film?

4. Are the obscenity statutes (18 U.S.C. §§ 1462, 1465) unconstitutional on their faces and as applied to these petitioners?

Parties in the United States Court of Appeals

The parties in the Court below were:

1) The United States of America, plaintiff;
2) Anthony Battista (judgment of conviction affirmed, App. A, *infra*, p. 1a, *et seq.*);
3) T. Anthony Arnone (judgment of conviction affirmed, App. A, *infra*);
4) Louis Peraino (petitioner, herein);

5) Bryanston Distributors, Inc. (petitioner, herein);

6) Gerard Damiano Film Productions, Inc. (petitioner herein);

7) Joseph Peraino (judgment of conviction reversed and indictment dismissed, App. B, *infra*, p. 18a, *et seq.*)

8) Plymouth Distributors, Inc. (judgment of conviction reversed and indictment dismissed, App. B, *infra.*)

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United States v Joseph Peraino, - F.2d - (6th Cir., April 6, 1981,)

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Sixth Circuit was dated and filed on April 6, 1981 (App. A, *infra*, p. 1a.

The co-appellants, Anthony Battista and T. Anthony Arnone, filed a petition for rehearing in the Court of Appeals, and that petition was denied on June 12, 1981, App. C, *infra*, p. 32a.

The jurisidiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercize thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

18 U.S. Code, §1462, Importation or transportation of obscene matters

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy photograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

(As amended May 27, 1950, c.214, § 1, 64 Stat. 194; Aug. 28, 1958, Pub.L. 85-796, § 2, 72 Stat. 962; Jan. 8, 1971, Pub.L. 91-662, § 4, 84 Stat. 1973.)

§ 1465. Transportation of obscene matters for sale or distribution

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

(Added June 28, 1955, c.190, § 3, 69 Stat. 183.)

STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction

This is a Federal criminal prosecution, commenced by the filing of an indictment, on June 13, 1975, by a grand jury in the Western District of Tennessee, Western Division. The indictment charged that petitioners and about one hundred other named people and corporations, as well as "others whose names to the Grand Jury are unknown. . ." engaged in a conspiracy (18 U.S.C. 371) to distribute an obscene motion picture ("Deep Throat") in interstate commerce (18 USC 1462, 1465), and that the conspiracy commenced on February 26, 1971 and continued to the filing of the indictment. Eighteen persons and corporations were named as defendants; the others were named as unindicted coconspirators.

A second count of the indictment charged that the same defendants engaged in a substantive violation of 18 USC 1465 when the film was transported to the Western District of Tennessee on or about February 20, 1974.

B. Course of Proceedings

The indictment was joined for trial with a subsequent, almost identical indictment against two other individuals. The case has been tried twice, with an intervening appeal to the United States Court of Appeals for the Sixth Circuit.

The first trial commenced on March 1, 1976, with seventeen defendants. The trial concluded on April 30, 1976, with jury verdicts against each of the defendants as to the conspiracy count, and as against certain of the defendants with respect to the substantive count. Petitioners Louis Peraino and Bryanston Distributors were aquitted as to the substantive count. Petitioner Gerard Damiano Film Productions, Inc., was convicted as to the substantive count.

On appeal, the Court of Appeals reversed the convictions, upon the Government's confession of error with respect to a defect in the trial court's instructions to the jury.

The second jury trial commenced on November 13, 1978. The Government chose not to pursue prosecution of the substantive offense against any of the defendants, and the second trial was limited to the conspiracy charge against eleven defendants. Seven defendants, including petitioners, were found guilty, three were found not guilty, and the jury was unable to agree as to one defendant.

On appeal, the Court of Appeals reversed the convictions of two defendants (Joseph Peraino and Plymouth Distributors, Inc.,) and ordered that the indictment be dismissed against them. The separate opinion of the Court with respect to those defendants is annexed hereto as Appendix B, *infra*, p.18a. The Court affirmed the convictions of each of the remaining defendants (Appendix A, *infra*, p. 1a).

Thus, each of the petitioners stands convicted of conspiracy to violate the aforementioned Federal obscenity statutes. Louis Peraino has been sentenced to a term of imprisonment of up to three years, with a provision that he is to serve six months and the balance suspended pending the service of an equivalent period of probation. A fine of ten thousand dollars was imposed upon each of the petitioners. Execution of all sentences has been stayed, pending appeal, and the Court of Appeals has stayed the issuance of its mandate, pending the filing of the instant petition.

C. The Film, Its Production and Distribution

The film "Deep Throat" was conceived and written in late 1971. The writer and director was Gerard Damiano. The picture was financed by Louis Peraino. It was filmed in Miami and New York City.

For approximately an hour, "Deep Throat" portrays the sometimes humorous, sometimes sad and frequently explicit efforts of a young lady to achieve sexual satisfaction. The storyline is well known to the countless millions of persons who paid to view the film and the many additional millions who have read about it. We respectfully request that the Court view the film, in connection with our contention that it is not legally obscene.

The evidence at trial falls into four distinct time periods, if unauthorized distributions are not included.*

1. The production of the film from late 1971 to April, 1972 by Petitioners Louis Peraino and Gerard Damiano Film Productions, Inc., and by alleged coconspirator Gerard Damiano. (Trial Transcript, at pp. 1224-1283).

2. The distribution of the film by Petitioners Louis Peraino and Gerard Damiano Film Productions, Inc., until they sold it to a foreign corporation in November, 1973. (Id., at pp. 1519, 1774, 1859-1864, 1896-1901, 1921, 1948.

3. Robert DeSalvo (an indicted defendant who has been a fugitive since prior to the first trial), a prior bootlegger of the film, thereafter acquired the United States distribution rights from a Bahamian corporation, and continued to distribute it until December, 1974. It was at DeSalvo's direction that the film was transported to Memphis. (Id. at pp. 1525-1550, 1663-1668, 2351, et seq. 1973-1996, 3443-3445.

*Distribution of the film, without the permission of its owner, is called "bootlegging." Government witnesses testified that "Deep Throat" was the subject of a great deal of bootlegging (T. 1558, 1622-4, 1615, 1945, 2047, 2693).

4. Distribution of the film in the Eastern United States by *Joseph Peraino* (uncle of petitioner, Louis Peraino) and his corporation, Plymouth Distributors, Inc., from January, 1975 until the filing of the indictment in June, 1975. (Id. at 3053-3060, 3455-3464)

The only issues at trial were: 1. Who was responsible for the distribution of the film to Memphis, i.e., what was the legal scope of the alleged conspiracy? and, 2. Is the film obscene?

There was no dispute that the film was transported to Memphis at the direction of Robert DeSalvo and was exhibited in at least one theatre there for about a month.

Similarly, there was no dispute that the film was an extraordinary box office success in Memphis and throughout the Country. As one government witness testified:

> *"As a matter of fact, what gave me the idea to put, to try to get 'Deep Throat', I was sitting home on a Sunday and I picked up the New York Times Sunday edition and going through there magazine section I found approximately four to six pages all about 'Deep Throat', and they said how chic it was....That was [,] to go to this picture, they claimed that people coming up in white mink coats, that celebreties were running to it, that is what gave me the idea to try and get this picture for Florida, and since it was coming to the height of the season in Florida, I made an effort to get it. In fact, I gave up running, I owned at that time 6 of my own theaters in New York. I gave all of that up just to go to Florida to put the picture over." (Trial Transcript, at p. 1548-1549).

ARGUMENT

Introduction

The production and distribution of the film "Deep Throat" coincided with wide-spread attitudinal changes in this Country concerning sexual matters and with this Court's determination to permit local communities to decide for themselves the extent to which sexually explicit materials will be tolerated beyond that which is clearly protected by the First Amendment. *Jenkins v Georgia*, 418 U.S. 153 (1974); *Miller v California*, 413 U.S. 15,, 24, 30 (1973); *Hamling v United States*, 418 U.S. 87, 104-106 (1974); *Smith v United States*, 431 U.S. 291, 300-301 (1977).

It is common knowledge, and was attested by the Government's own witnesses at the instant trial, that "Deep Throat" was a box office sellout on a national scale - an unprecedented accomplishment for a film dealing with explicit sexual conduct. This case, therefore, does not present a hypothetical exploration into the frontiers of community toleration. The film's historical significance is not how prosecutorial agencies and courts have thus far dealt with it, but rather how the Nation reacted to it. One must conclude that it was not merely an odd quirk that the foreman of the indicting Grand Jury, herein, had paid to see the film long before he was called for Grand Jury service, or that, according to him, other members of the Grand Jury had done likewise (*infra*, p. 23).

* * *

Part I of our argument, *infra*, p. 16, demonstrates that the prosecution and conviction of petitioners, if permitted to stand, will, for practical purposes, destroy the local community standards concept. The author, producer or regional distributor of a sexually explicit film, book or magazine will be subject to a conspiracy prosecution in any community which finds such a work offensive, if a successor-in-interest or some other distributor intentionally or by

error of judgment introduces the work into such a community. The chilling effect of the decision is manifest. We urge that the Court of Appeals holding is in conflict with this Court's community standard decisions, *supra*, and presents an important question of Federal law which should be settled by this Court.

* * *

Part II, *infra*, challanges the propriety of a grand jury returning an obscenity indictment without ever having viewed the offending film. The Court of Appeals held, without qualification, that such a viewing is unnecessary. Moreover, the Court of Appeals held that, where no recording exists of the testimony before the Grand Jury and where no Government record or prosecutorial recollection exists as to *whether* any description, much less an adequate description, of the offending work had been given to the Grand Jury, the questioning of Grand Jurors for their recollections would be an improper invasion of Grand Jury "secrecy". We submit that these rulings present substantial questions under the First and Sixth Amendments, which ought be settled by this Court.

* * *

Part III, *infra*, first contends, as a matter of law, that the film, "Deep Throat", was not shown to be obscene. The more stringent limits of community discretion in the evaluation of alleged obscenity must be determined within the context of what the present day national society will tolerate to be branded as being of no* or inconsequential value or as being patently offensive. We submit that the wide acceptance of this film, when combined with the "utterly without" value test which was applied in this case, requires the determination that it is not obscene. We additionally contend that the defense was deprived of a fair opportunity to demonstrate to the jury that the film was not violative of community standards and had social value.

* * *

* The "utterly without" test of *Roth v United States*, 354 U.S. 476, 487 n.20 (1957) was given to the jury in the present case.

Part IV asserts that the Federal obscenity statutes herein are unconstitutional, as a matter of law, and as applied to these petitioners.

I

The indictment and trial impermissibly sought to mask multiple conspiracies behind the claim of a national obscenity conspiracy.

The effect of such an approach is to eradicate the significance of local community standards since, under such a theory, any locality could prosecute the author, producer, and all distributors of an allegedly obscene work.

The court's instructions to the jury compounded the error.

The Court of Appeals dismissed petitioners' multiple conspiracy claim, without reference to the First Amendment implications of its holding that a single national conspiracy was established.

> "It is clear that the indictment alleged only one conspiracy namely to transport an obscene film in interstate commerce. The conspiracy did not relate to merely one shipment to a particular place, but was national in scope and related to many shipments made to different states." (App. A, at p. 9a).

Similary, the Court of Appeals rejected petitioners' contention that, it was improper for a trial court to impose a dramatic nation-wide disavowal obligation upon the producer of a film, in order for him to avoid subjecting himself to liability for someone else's subsequent distribution of the film to a community in which the film is violative of local community standards. (App. A, at p. 14a)

A. The Indictment

The indictment (App. F, *infra*, at p. 37a) is jurisdictionally predicted upon the transportation of the film to Memphis from Florida, in February, 1974. It was actually shown in movie theaters in Memphis for only a brief period in February and March, 1974. Based upon the aforesaid transportation and exhibition, the Government sought to fashion, into one conspiracy, every person involved in the creation, distribution, transportation, and display of the film anywhere in the United States, from its creation in early 1972 until the filing of the indictment in June, 1975.*

B. The Reversal and Dismissal with respect to the Co-Appellant, Joseph Peraino.

Joseph Peraino and his corporation, Plymouth Distributors, distributed "Deep Throat" in the North Eastern area of the United States, commencing a number of months after the film stopped showing in Memphis. Nevertheless, the indictment asserted jurisdiction over him and the Government claimed that his subsequent distribution qualified him as a member of the national conspiracy, subjecting him to a trial upon Memphis community standards.

In reversing Joseph Peraino's conviction (following two trials) and in dismissing the indictment against him, the Court of Appeals has drawn a Consitutionally irreconcilable line between his posture and that of petitioners.

* A leading text on the subject of criminal conspiracy comments upon the exceedingly wide range of the instant indictment and singles out this indictment for reproduction in full. P. Marcus, *Prosecution and Defense of Criminal Conspiracy Cases* (Matthew Bender, 1978), § 10.08 and Appendix j, thereof.

The petitioners produced and distributed the film prior to the Memphis distribution, but were not shown to have had any knowledge, involvement or stake in the transportation of the film to Memphis. The Co-defendant Joseph Peraino only distributed the film after its brief appearance in Memphis.*

The Court of Appeals held:

> "The general rule that one who joins a conspiracy at any time before it ends may be held responsible for acts and agreements which took place before he joined, e.g. *United States v Cimini*, 427 F.2d 129, 139 (6th Cir.) *cert. denied*, 400 U.S. 911 (1970), does not control when First Amendment rights are at stake. In most cases the illegal purpose of a federal conspiracy will be illegal in every federal jurisdiction. However, when the agreement alleged is one to distribute materials which constitute expression, the agreement may have both legal and illegal purposes depending on varying community standards.[1] Where one joins an ongoing undertaking to distribute expressive materials interstate he should not be convicted solely on the basis of agreements and overt acts which pre-dated his joining.[2] In order to avoid violation of such person's First Amendment rights, the government is required to prove either that he agreed to distribution of material where it would be found obscene or permitted such future distribution to occur and failed to withdraw from the conspiracy." (App. B, at pp. 23a-24a).

Excerpts from the two footnotes to the foregoing amplify the Court's reasoning:

> "[1]***We *do* hold that to convict one as a conspirator it

* The indictment charged, and, over objection, the Government proved at trial, distributions of the film to communities all over the Country (App. F, overt acts 14-23, 25-26).

is necessary to prove that a purpose of the conspiracy, at the time the conspirator was a member, involved a community, the standards of which were violated by the film." (App. A, at p. 23a, fn.2). [*Emphasis added*].

"2***In the present case, although overt acts were alleged after [Joseph] Peraino and Plymouth began distribution, none was shown to violate the standards of a community in which it took place." (App. A, at p. 24a, fn.3) [*Bracketted material added*].

We agree with the foregoing reasoning, to the extent that it recognized the lack of a proof of conspiracy as to Joseph Peraino. It's attempt to distinguish prior, similar innocent conduct, on the part of petitioners, is lacking in logic.

One can be guilty of membership in a conspiracy only if he has a criminal objective. The only criminal objective properly involved in this case was the distribution of the film into a community whose standards would be violated. The only community standards involved in this case were those of the Western District of Tennessee. In *Peraino, supra*, the Court of Appeals conceded that this was the case and doubted that a jury in Memphis could "properly determine" the community standards of some other locality. (Appendix A, *infra*, at 26a-27a).

Petitioners had a right to distribute the film to communities which tolerated or accepted it. There was no proof at trial that they did otherwise. There is no reason why the exercize of that right should subsequently be converted into a criminal act by virtue of the independent conduct of others who sent the film to Memphis.

We respectfully submit that the indictment and trial herein constituted an improper, retroactive extension of a local conspiracy. Petitioners were not shown to be members

of a single national conspiracy, nor were they shown to have conferred jurisdiction over them upon the Western District of Tennessee.* Reconciliation of the First Amendment Community standards requirement and the Sixth Amendment venue requirement, can lead to no other conclusion.

C. The Court's Charge As To Community Standards.

Assuming, *arguendo*, that the Court of Appeals' reasoning is correct, to the effect that a subsequent criminal distribution converts prior non-criminal activity, by others, into part of a national conspiracy, then the petitioner's were, at least, entitled to be judged according national standard. The Court of Appeals rejected the argument, merely stating that it "is wholly without merit." (App. A, at 13a). We submit that if a locality can take a "national" approach, then it is bound to apply a national standard to persons who had no knowledge of, or participation in, the local distribution.

*The indictment having drawn different distributions of the film by different people into a single conspiracy, the District's Court's charge to the jury imposed a ludicrous withdrawal duty upon those, such as the petitioners, who had engaged in prior, presumptively legal distributions, elsewhere.

The substance of the Court's instruction is quoted in the Court of Appeals opinion, App. A, at p. 14a. "For example, a defendant may withdraw by making a clean breast to the authorities or by communicating his withdrawal to his co-conspirators...by some effective means."

Should the petitioner have told the Memphis authorities that the film was playing in their local theatre, or that the film had been distributed in other parts of the country? Should they have told the Memphis distributor that they were no longer distributing it in other parts of the country. What sense would any such conduct have made within the context of this case?

II

The petitioners were effectively deprived of their constitutional rights to fair grand jury proceedings since the grand jury never viewed the allegedly obscene film, and the defense was effectively prevented from demonstrating that the grand jury lacked an adequate factual basis upon which to indict.

A. Where the Government Has An Allegedly Obscene Work In Its Prossession, It Is Required to Permit The Grand Jury To Review The Work Before Requesting an Obscenity Indictment.

The Court of Appeals, in this case, has determined that it is proper for an obscenity indictment to be returned without the grand jury every having viewed the allegedly obscene film (App. A, at 6a). Our research indicates that this is a holding of first impression. Neither the Government nor the Court of Appeals has cited any authority for the proposition.

In an obscenity case, the chief and indispensable item of evidence is the allegedly obscene work, and it must be viewed as a whole. When distribution of such a work results in an indictment, the indictment, itself, places a restraint upon further distribution of the work.

In the instant case, the indictment was pending for more than 4 years before the commencement of the instant trial. Thus, in terms of First Amendment values, an indictment, alone, can have a devestating effect upon those who would fear implication in such an ordeal. If the value theory which was adopted by the prosecution in the present case is correct, then the inhibiting effect of such an indictment will be nationwide.

We cannot conceive of how it can possibly be justified for a grand jury to be permitted to take such a drastic action effecting not only the First Amendment rights of the defendants, but also the First Amendment rights of the public at large, without an examination of the crucial, readily available evidence.

In *Marks v. United States*, 430 U.S. 188 (1977), the Solicitor General of the United States confessed that it was clear and prejudicial error for A Court of Appeals not to have viewed an allegedly obscene film, where the claim of obscenity was contested on appeal (*See:* Brief of the United States in *Marks v. United States, supra*, at pp. 34-41.)

Whatever the merits may be with respect to the obligation of an appellate court to view such a film, we respectfully submit that it cannot be avoided for the charging authority, ie., the grand jury, to be required to view the film as a condition precedent to an indictment. It boggles the mind that the government would elicit many months of testimony before several grand juries, as was here the case, in an effort to secure an obscenity indictment, without ever showing the indicting grand jury the film in question.*

We are well aware of the liberality which the Federal courts will permit a defendant to undergo the ignominous and burdensome experience of prosectution based on hearsay presented to a grand jury. However, even in cases not involving obscenity, it has been recognized that the unnecessary, exclusive reliance upon hearsay can constitute an abuse of the grand jury process to an extent which may require dismissal of the indictment. See: *United States v. Mayersohn*, 452 F. 2d 521 (2nd Cir., 1971); *United States v. Liebowitz*, 420 F. 2d 39 (2nd Cir., 1969); *United States v.*

*The government had the film in its possession since October, 1973.

Barrish, 412 F. 2d 26 (2nd Cir., 1969); *United States v. Gramolini*, 301 F. Supp. 29 (D.C., RI, 1969); *ABA Standards for Criminal Justice*, The Prosecution Function, §316(a).

The Government had the film in its possession. No claim has been made that any difficulty prevented its exhibition to the Grand Jury. We respectfully submit that this omission, alone, warrants review by this Court, and raises serious questions under the First and Fifth (indictment by a Grand Jury and due process of Law) Amendments.

B. The Failure of the Government To Establish That The Grand Jurors Were Provided With an Adequate Description of the Film.

The Government has conceded that no document, describing the film was submitted to the Grand Jury, and that no record was made of any description which may have been given to the Grand Jury, and that nothing in the Government files would shed any light upon whether *any* description was given to the Grand Jury (Hearing transcript of November 7, 1978, at p. 33-34; *see also*, the opinion of the District Court on this issue [Appendix D, *infra*, p. 34a] and the exhibit attached thereto [Appendix E, infra].)

Several weeks prior to a hearing on the issue, the District Court prohibited the parties from interviewing the grand jurors in preparation for the hearing (proceeding of October 27, 1978, at p. 58). Nevertheless, the prosecutor ignored the Court's direction and interviewed several of the Grand Jurors.

One of those interviewed was the foreman of the Grand Jury. The foreman recalled that he had seen Deep Throat some fourteen months prior to being summoned for Grand Jury duty, and further recalled that an FBI agent, whose

identity he could not recall, had provided the grand jury with a detailed description of the film. The foreman could not recall the identity of the agent. Each of the only two agents who worked on the case had no recollection of ever giving *any* description to the Grand Jury. (Hearing of November 7, 1978, at pp. 49-54, 63-66, 94-110).

The defense refused to accept the accuracy of the foreman's testimony, particulary since he had seen other explicit films, both within and without the Grand Jury (Id., at 71-79). Despite the Government's total reliance upon this one grand juror, and the Government's violation of the Court's direction not to contact grand jurors, the Court nevertheless refused to permit the defense to interview the remaining grand jurors. (Id. at p. 156)

Even if unnecessary hearsay were a permissible basis for an indictment in an obscenity case, we respectfully submit that the crippling stricture placed upon the defense, when combined with the total lack of any testimony by a representative of the Government or any Government record support with respect to whether such a description was given, compels the conclusion that the Government failed to meet its burden of establishing that the Grand Jury was adequately advised of the content and quality of the film, taken as a whole.

The Court of Appeals, has responded to this devestating disregard for First Amendment values by holding that the foregoing information should never have been revealed to the defense (App. A. at p. 6a). Thus, reasoned the Court of Appeals, it should be ignored and we should only look to the face of the indictment to test its validity. We respectfully submit that such an analysis is defective. What secrecy value could possibly have been involved in denying to the defense and the court the substance of what (if anything) was told to the Grand Jury about the content of the Film?

* * *

The entire manner in which the Grand Jury aspect of this case was handled requires a dismissal of the indictment or a remand to adequately reconstruct what was told to the Grand Jury.

III

The Government failed to establish that the film "Deep Throat" is obscene; the defense was improperly restricted in its proof on that issue; and the prosecution was wrongfully permitted to introduce evidence that the film might be harmful to some people.

A. The Applicable Obscenity Standard.

Well in advance of the testimony of the expert witnesses, and with approval of the Court, the prosecution and the defense stipulated to the obscenity standards which would be charged to the jury, and the Court so charged.*

Those standards were as follows**:

> "There are three tests which must be applied with respect to obscenity, and all three elements must be found to exist before the film can be found obscene. The tests are:
>
> 1. Whether the average person, applying contemporary community standards, would find that the movie, taken as a whole, appeals to the prurient interest in sex;
>
> 2. Whether the movie is patently offensive because it affronts contemporary community standards relating

*Trial Exhibit 185; Trial Transcript, pp. 2029, 4913, 4914.

**Distribution of the film by the alleged conspiracy commenced prior to the Supreme Court's opinion in *Miller v California*, 413 US 15. The indictment, however, recited the *Miller* standards which, in certain respects, are more stringent than the previously existing *Roth-Memoirs* standards.

to the description or representation of sexual matters because it depicts or describes in a patently offensive way sexual conduct, that is: patently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals; and

3. Whether the movie is utterly without redeeming social value." (T. 4913-4914).

The opinions of this Court leave no doubt that books, pictures and films are presumptively protected by the First Amendment, and that, to remove that presumption with respect to any particular item requires that the Government establish, beyond a reasonable doubt, that the item is obscene.

In the present case, it was the Government's burden to establish that the film violated *each* of the three criteria which are set forth in the stipulation which is quoted, *supra*. In fact, the Government offered no proof as to any of those criteria. Instead, over objection, the Government's single expert witness* was permitted to testify as to alleged harmful effects that the film *might* have upon certain susceptible adults. The harmful effect claim plays no role in any of the criteria set forth in the stipulation or in any of the criteria which have been articulated by this Court.

We respectfully submit that the Government's proof on this issue deprived the defendant of a fair trial since such proof is, itself, violative of the First Amendment and irrelevant to the issue of obscenity.**

* Victor Cline, a Salt Lake City Psychologist.

**The Court denied a defense request to instruct the jury that possible harmful effects may not be taken into consideration during the determination of whether the film is obscene, particularly if the film has any social value. We urge that the failure to give such an instruction was reversible error (Trial Transcript, at pp. 4833-4836).

A. Prurient Interest.

The first criterion to be met was, "whether the average person, applying contemporary community standards, would find that the movie, taken as a whole, appeals to the prurient interest in sex." The only knowledge that the prosecution witness had of the contemporary community standards of Memphis was that it had "topless and bottomless places", 13 adult bookstores and 4 adult theaters which showed sexually explicit movies." (Trial Transcript, at 3684-96)

Highly qualified defense experts,* unequivocally testified that the film does not appeal to a prurient interest, but, rather, appeals to a healthy curiosity in sex and tends to overcome prurient attitudes which are generated by ignorance.

B. Patent Offensiveness.

The second criterion is whether the movie affronts contemporary community standards by depicting ultimate sex acts in a patently offensive way. There can be no doubt that "Deep Throat" depicts ultimate sex acts.

The Government's proof offered no guidance to the jury on this issue. As was the case in the rest of the country, when the film was shown in Memphis it was a box office sellout. At least 3 members of the grand jury that returned the instant indictment saw the film before they were called

*The defense witnesses were:

1) Stanley L. Portnow, Professor of Psychiatry, New York University School of Medicine; 2) Patricia D'Encarnacao, Memphis Psychiatrist and Director of the Mid-South Center for Martial and Sexual Therapy; 3) Otto Larsen, a Sociologist and former chairman of the President's Naitonal Commission on Obscenity and Pornography.

to serve on the grand jury. For a film that played in Memphis for barely a month, that statistical indication of community acceptance is quite significant.

A defense expert, with intimate knowledge of the Memphis-area community testified as to the extent to which comparable materials had been accepted by a cross-section of persons in that community, including representives of religious groups (Trial Transcript, at 4178-4188, 4243).

C. Comparable Materials.

The Trial court committed reversible error in refusing to permit the jury to view slides* that were regularly utilized by a defense expert in sex education programs throughout the Memphis area. The slides depict numerous types of heterosexual activity, including a veritable duplication of the classic "Deep Throat" technique, and in the opinion of the defense expert, the slides were comparable to the film, "Deep Throat" (Trial Transcript, at 4187-4188, 4212). After viewing the slides, the trial court found them not to be comparable, and refused to permit them to be shown to the jury (Trial Transcript, at 4225, 4229, 4238).

The failure of the trial court to permit the slides to be shown to the jury deprived the defense of a fair opportunity to meet the issue of obscenity and demonstrate community acceptance and social value.

D. Social Value.

Notwithstanding the trial court's error in excluding the above noted slides, we contend that the trial proof demonstrated that the film had, at least, some social value.

*Exhibit 201, for identification.

Pursuant to the trial stipulation, it was the burden of the prosecution to establish that the film was "utterly without redeeming social value." This Court has held it to be virtually impossible for the Government to sustain such a burden. *Miller v. California, supra.* In view of the trial proof it can hardly be said that the government accomplished that virtual impossibility.

The approach of the Government expert to the question of social value was to concede that there were parts of the film that could serve an appropriate educational purpose but that those parts were overshadowed by other "pathological elements in the film" (Trial Transcript, at 3594-3595, 3769). When pressed on the subject, he conceded that his opinion was based not upon the merits of "Deep Throat", itself, but rather upon the theory that "Deep Throat" would set a precedent for a whole series of other films (Trial Transcript, at 3718).

In short, his argument seemed to be that whatever educational value the film might have was overcome by the possibility that such a film and others after it might gain community acceptance. He, thus, created an ironic and contradictory tension between the concepts of community standards and educational value.

To the contrary, the defense experts — all of whom were far more experienced and professionally qualified, made clear that the film possesses a great deal of educational, social and theraputic value.

E. Intent and manner of Distribution.

Each of the Government witnesses, who had participated in the distribution or exhibition of the film, testified that he he did not believe such activity was criminal. Similarly, it

was undisputed that the film was exhibited only to consenting adults and that children were excluded.

One fact which bears upon the issue of obscenity is the intent of the author of an allegedly obscene work. While that issue may not be controlling, it is relevant. The intent of Gerard Damiano was elicited from him upon the Government's direct examination of him when he testified as a government witness:

> "Q. What is Deep Throat about, Mr. Damiano?
>
> "A. It is about an attitude. It's about two thousand years of sexual repression. It is about people who are unable to live any kind of fulfilling lives...it's about two thousand years of unfulfillment. The point with the new sexual awareness, people who are unhappy sexually have started asking questions as to why am I unhappy. They started seeking help in the picture as Linda in the picture, so it helped through Dr. Feelgood. It is about the fact that people should be able to enjoy sex without guilt. It's not being ashamed of yourself or your body. It's about all of those things." (Trial Transcript 1242-43)

Damiano further testified that he believed that the sexual content of the film was pertinent to the story which the film sought to tell. He tried to show that sex could be funny and that people did not have to be ashamed of it. He had no intention of creating an illegal film, but rather, tried to build socially redeeming value into the movie, seeking to make it a film work of art. (Id. at pp. 249-, 1262, 1271-1276)

Eighty percent of the film has a musical score, which is an integral part of the movie and of the story line (Id. at pp. 1264, 1277).

Additionally, film libraries, such as the Library of

Congress and commercial film outlets were utilized to secure film footage, of a non-sexual nature, which was used for special effects throughout "Deep Throat" (Trial Transcript, at pp. 1267).

Damiano contrasted "Deep Throat" to pornographic films which are so-called "film loops" that have no story line and merely depict sex for the sake of sex (Id. at p. 1273).

Much of the Government's proof, unnecessary to recount here, was devoted to establishing that the film "Deep Throat" was seen by countless *millions* of people throughout the United States, with people waiting on long lines to view the film. That proof demonstrated that the film had been accepted by communities throughout the country and had been an overwhelming box office success as compared to the vast majority of films. Typical of such testimony was that of Government witness Pat Baca.

Baca is a theater owner in Albuquerque, New Mexico. He commenced exhibiting the film in 1973 (Id. at pp. 1551-1553, 15563). Albuquerque has a population of 300,000 people and about 35 or 40 movie theaters. The picture would run from 11 a.m. until about midnight, and the theater was continually full and people had to be turned away. He continued displaying the picture until the summer of 1978 (five and one half years). It was the longest continuing motion picture booking that there has ever been in Alberquerque (Id. at 1569, 1571).

How is it possible that a film, which has been accepted by countless millions of adults in this country, both in Memphis and elsewhere, can be found to be violative of community standards?

Aside from the author's intent and the popular acceptance of the film, it may be relevant as to whether the persons who distributed the film engaged in "pandering". There was no evidence introduced at this trial that anything but inoffensive advertising was utilized with respect to the marketing of this film. Advertising consisted of two types of materials. The first is a poster of the type that is generally displayed in the lobby of a theatre. The poster which was used to advertise "Deep Throat" was received in evidence as Government Exhibit 100 and we urge this Court to examine it. The second form of advertising is called an ad mat which is provided to local movie theatres so that they can use it to advertise in local newspapers. Such an ad mat was received in evidence as Government Exhibit 32A and we urge this Court to examine it.

Pursuant to the motion picture code, the poster and the ad mat bore the "X" symbol in order to alert the public that the movie was sexually explicit.

* * *

In summary, the film Deep Throat was not shown to be obscene under contemporary community standards.

IV

18 USC§ 1462 and§ 1465 are facially unconstitutional, and are unconstitutional as applied to the petitioners.

A. The Facial Unconstitutionality of the Statute.

Although this Court, heretofore, has held 18 USC § 1465 to be constitutional, *Marks v. United States*, 430 U.S. 188 (1977), four justices of the Court, one less than a majority, were of the opinion that the statute is unconstitutional.

Therefore, we persist in our contention that limitations upon photographic and written expression, based upon an allegation of obscenity, are violative of the First Amendment guarantee of freedom of expression, and that the obsenity statutes involved in this case are violative of that freedom and are so vague and lacking in meaningful criteria as to be violative of due process of law.

B. The Statute as Applied.

At trial, it was stipulated by the defense and the prosecution and charged to the jury by the Court, that the "utterly without redeeming social value test" is applicable to this case (Trial Exhibit 185, Trial Transcript, at 4913-4914). In *Miller v. California*, 413 U.S. 15 (1973), this Court held that the obscenity standard which had been ennunciated in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), was a test which, for all practical purposes, was not possible to apply. That being so, the defendants in this case were not given adequate notice as to the type of film which the federal statute prohibited them from distributing.

In *Miller, supra*, the Court said:

> "While *Roth* presumed 'obscenity' to be 'utterly without redeeming social importance', *Memoirs* required that to prove obscenity it must be affirmatively established that the material is '*utterly* without redeeming social value.' Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was "*utterly* without redeeming social value" — a *burden virtually impossible to discharge under our criminal standards of proof.* [Last emphasis added]. Such considerations

> caused Justice Harlan to wonder if the '*utterly* without redeeming social value test had any meaning at all.'***" 413 U.S. at 21-22.

Judged by that standard, found by this Court in *Miller* to be "virtually impossible" to prove, the petitioners herein cannot justifiably be found, beyond a reasonable doubt, to have been given adequate notice of the conduct prohibited by the statute.

* * *

In assessing the Constitutionality of the statute, as applied to petitioners, their unique situations must be taken into account. They are being held responsible for subsequent conduct undertaken by others, in a jurisdiction they never visited, and with respect to subject matter which may be criminal in one place and a protected right in another. To make the movable standards and evaluations of another time and another place applicable to them, within the context of an already vague statute, strains a sense of justice and First Amendment values beyond tolerable limits.

CONCLUSION

For all of the above reasons, the petition for a writ of Certiorari should be granted.

Respectfully submitted

Philip E. Kuhn
Counsel for Petitioner

Henry J. Boitel,
Of Counsel

July, 1981

APPENDICES

APPENDIX A

Opinion of the Court of Appeals

Nos. 79-5165, 79-5257, 79-5258, 79-5259, 79-5260

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY BATTISTA (79-5165)
T. ANTHONY ARNONE (79-5257)
LOUIS PERAINO (79-5258)
BRYANSTON DISTRIBUTORS, INC. (79-5259)
GERARD DAMIANO FILM PRODUCTIONS, INC. (79-5260),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed April 6, 1981

Before: WEICK, LIVELY and KENNEDY, Circuit Judges.

WEICK, Circuit Judge. Defendants have appealed to this court from the judgment of conviction and sentence entered by the district court upon a verdict of guilty returned by a jury in their second trial on an indictment charging them with conspiracy to violate the obscenity statutes, 18 U. S. C. § 1462 and § 1465 by transporting the obscene film Deep Throat in interstate commerce.[1] Three of the defendants who

[1] Their conviction in the first trial was reversed by this court on the confession of error by the United States Attorney because of an

were tried, Angelo Miragliotta, Anthony Novello, and Mario De Salvo were found not guilty and the charges were dismissed as to them. The defendants found guilty were sentenced as follows: Louis Peraino, 3 years, all but 6 months suspended and a fine of $10,000; Gerard Damiano Film Productions, Inc., fined $10,000; Bryanston Distributors, Inc., fined $10,000; T. Anthony Arnone, 2 years with all but 5 months suspended and a fine of $3,000; Anthony Battista, 2 years with all but 2 months suspended and fined $2,000; Carl R. Carter, imposition of sentence suspended, 5 years probation and fined $1,500; Mell Friedman, 4 months concurrent, 1 year probation and fined $3,000; Michael Cherubino, mistrial declared when jury was unable to agree, charges dismissed.

The appeals were consolidated for oral argument and were submitted to the court on 6 large appendices totaling 3033 pages, 121 transcripts, appellants' briefs raising many issues with subdivisions; the government's brief of 114 pages and lengthy oral arguments. It appears to us that these cases have been given very careful consideration by the district judge and also by the jury. As indicated above, one defendant was given probation and fined $1,500, the sentences of imprisonment ranged from 2 months to 8 months and the fines ranged from $1,500 to $10,000 with most in the lower range.

On appeal, the appellants, jointly or severally, when applicable, have questioned the propriety of the proceedings before the grand jury; the constitutionality of the obscenity statute 18 U. S. C. 1465; the sufficiency of the evidence; the seizure of the film; the admisison or exclusion of evidence; the closing argument of the Assistant United States Attorney; the court's instructions to the jury; the court's failure to discharge the jury prior to the Christmas recess; the sentencing of Louis Peraino.

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erroneous instruction to the jury on including children in community standards, which was held improper by the Supreme Court subsequently in *Pinkus* v. *United States*, 436 U.S. 293 (1978).

As we will point out hereinafter none of these contentions has merit and the convictions will be affirmed.

I

The Grand Jury Proceedings

In the district court, appellants attacked the grand jury proceedings by filing a motion to dismiss the indictment. Prior to the first trial, they made a similar attack which was denied by the court. They contend that the 1974 grand jury which returned the indictment (CR-124) was not properly constituted; that the grand jury did not have probable cause on the issue of obscenity to return the indictment; that the grand jury was not properly instructed on the law of obscenity.

The attack on the 1974 indictment would seem to be irrelevant and misplaced because it was supplanted by a superseding indictment in 1975 being CR-91.

The government strenuously objected to any inquiry into or invasion of the secrecy of the grand jury proceedings. The district court, however, out of an abundance of caution, conducted a lengthy evidentiary hearing. The government called the foreman of the grand jury, Herschel McElroy, who testified. The defendants called two F. B. I. special agents.

A stipulation of facts was approved by all parties and read into the record. The relevant provisions are as follows:

> The grand jury which had been impaneled on January 22, 1973, which was extended to June 25, 1973, heard proof concerning the distribution of Deep Throat. On November 15, 1973, this 1973 grand jury viewed the entire film content of Throat at the Tri-State Theater, Memphis, Tennessee. On December 10, 1973, it heard testimony of approximately eight witnesses concerning the conspiracy involving the film.
>
> In January of 1974 a new grand jury was impaneled. It continued the investigation of Throat and the conspiracy. Between January and the end of June, 1974, on more

than eight occasions, it heard testimony from various witnesses. On May 8, 1974, it also went to view the film. After seeing 15 to 20 minutes of it, they decided they had seen enough and elected not to see the remainder.

On May 1, 1974, all three judges in this district entered an order extending the term of the 1974 grand jury until the *end* of December, 1974. By Court order of July 13, 1974 twelve members of the grand jury were replaced by twelve members that were newly qualified. Eleven of the original members of the 1974 grand jury elected to continue to serve for the second six month period.

During early August of 1974, the 1974 grand jury heard testimony of five witnesses concerning the conspiracy surrounding Throat. [From November 1973 through August of 1974 the grand jury heard testimony of more than sixteen witnesses; a number of witnesses cited above in certain cases were witnesses who were called back.]

On August 15, the 1974 grand jury returned the indictment in the case styled CR 74-124 naming as defendants Anthony Joseph Peraino, Louis Peraino, Robert J. DeSalvo, T. Anthony Arnone, Anthony Battista, Mario DeSalvo, Gerard Damiano Film Productions, Inc. and AMMA Corporation.

In January of 1975 a new grand jury was impaneled. It continued to hear proof concerning the investigation of the conspiracy involving Throat. On June 13, 1975, this grand jury returned a superceding indictment styled CR 75-91 naming as defendants each of the ones previously named in CR 74-124 and adding the following defendants: Herbert Nitke, Michael Cherubino, Joseph Peraino, Carl Carter, Mel Friedman, Herbert Streicher, Bryanston Distributors, Inc., Maines & Associates, Inc., and Plymouth Distributors, Inc.

Each of these three grand juries, 1973, 1974 and 1975, was given instructions regarding the law of the definition

> of obscenity by the Assistant United States Attorney handling the case. These instructions included the *Miller* test of obscenity. There is no recollection by anyone concerning whether or not children were included in the make up of the average person in the community as that phrase is applied to the definition of obscenity.
>
> This stipulation expressly does not waive the United States' vigorous objection to this inquiry into the secrecy of the grand jury proceedings regarding this case and this stipulation is subject to any facts revealed at the hearing.
>
> The 1975 grand jury did not see the movie Deep Throat. (Ap. 2951-57).

The indictment and conviction of Joseph Peraino and Plymouth Distributors is being reviewed separately in Appeal No. 79-5081.

Mr. McElory served as foreman on the 1975 grand jury involved in the investigation of Deep Throat for the entire year. He had seen the movie and testified that two other members of the grand jury had seen it. The indictment was returned in June, 1975. The proof presented to the grand jury as to the sexual content of Deep Throat was the sworn testimony of an FBI Special Agent who read a detailed account of the movie including examples. The examples were oral sex; group sex; cunnilingus; and heterosexual intercourse. They clearly constituted hard core pornography. *United States* v. *Marks*, 520 F. 2d 913 (6th Cir. 1975) *reversed in other grounds* 430 U. S. 188 (1977).

Mr. McElroy on cross-examination further described the testimony of the FBI special agent before the grand jury as follows:

> It seemed to me he went into great detail to set each scene, the characters and exactly what they were doing down to the greatest detail. I was sitting there comparing it to the film I had seen not too many months

> earlier. I could not have sat there myself and written down anything closer to what the film actualy represented. (Ap. 2998).
>
> • • •
>
> I couldn't believe that I was reliving scenes of the film as it went from scene to scene. There were some that asked me, some other jurors, that had not seen the film. They knew I had seen it, and I couldn't think of anything that wasn't included. (Ap. 3000).
>
> • • •

The district court properly denied the motion to dismiss. In our opinion, it was not necessary for the district court to probe into the secrecy of the grand jury proceedings. There is a presumption of regularity which attaches to such proceedings and the defendants have a difficult burden to prove any irregularity. *Cf. United States* v. *Woods*, 544 F. 2d 242, 250 (6th Cir. 1976), *cert. den.*, 429 U.S. 1062 (1977). The defendants proved no irregularity in the present case. The defendants must also demonstrate a particular need that outweighs the secrecy policy. *United States* v. *Proctor & Gamble*, 356 U. S. 677 (1958).

In our opinion, the indictment was valid on its face. Any error on the part of the district court in probing the secrecy of the grand jury proceedings occurred at the insistence of the defendants and was harmful only to the government.

The validity of an indictment is not affected by the type of evidence which is considered by a grand jury even though inadequate or incompetent. *United States* v. *Calandra*, 414 U. S. 338 (1974); *Pittsburgh Plate Glass* v. *United States*, 360 U. S. 395 (1959).

In our opinion, the grand jury was properly instructed on the law of obscenity. During the trial all parties agreed to strike the *Miller* (413 U. S. 15) language from the indictment and to consent for the district court to charge a *Roth-Memoirs* (354 U. S. 476, 383 U. S. 413) standard with the benefits of *Miller*. However, even if an incorrect instruction was given

to the grand jury, which did not occur in the present case, the indictment was valid on its face and was sufficient to require a trial of the indictment on its merits. *Costello* v. *United States*, 350 U. S. 359 (1956); *United States* v. *Slepicoff*, 524 F. 2d 1244 (5th Cir. 1975).

II

Title 18 U.S.C. Section 1465 Is Not Vague Or Overbroad And Is Constitutional

We so held in another case involving a prosecution for transporting Deep Throat in interstate commerce. *United States* v. *Marks*, 520 F. 2d 913 (6th Cir. 1975) (Marks I); See also *Miller* v. *California*, 413 U. S. 123 (1973); *Smith* v. *United States*, 505 F. 2d 824 (6th Cir. 1974); no different rule is required for a multi-state conspiracy. *United States* v. *Sandy*, 605 F. 2d 210 (6th Cir. 1979), *cert. den.*, 444 U. S. 984 (1979).

III

Appellants Arnone and Battista Were Not Denied Due Process of Law. Scienter Was Proven.

The scienter required to support a conviction in the present case is that appellants knew the general nature and character of the film. All of the appellants had such knowledge as was clearly shown by the evidence. It was not necessary that the defendants have personal knowledge of the community standards in each and every place where they distributed the pornographic films. *Hamling* v. *United States*, 418 U. S. 87 (1974); *United States* v. *Sandy*, 605 F. 2d 210 (6th Cir. 1979), *cert. den.*, 444 U. S. 984 (1979).

IV

In our opinion, the district court did not err in denying defendants' motion for judgment notwithstanding the verdict

as Deep Throat is obscene under constitutional standards. A jury issue was presented and in our opinion there was substantial evidence to support the jury's verdict. A majority of the panel have viewed the film. We are unanimously of the opinion that it constituted hard core pornography. *United States* v. *Marks*, 585 F. 2d 164, 171 (6th Cir. 1978).

V

Appellant Arnone challenged the search upon which the film was seized claiming that it was unreasonable and that the affidavit for the search warrant was insufficient.

Arnone owned a 50 percent interest in the stock of the corporation which held title to the film. Former FBI agent Hester testified that he was investigating the film entitled "The Devil In Miss Jones" and interviewed Jim Newman who was carying a large box. Newman was using an alias "Bill Cann" and was leaving a motel in Memphis to return to Florida. Newman declined to advise Hester of the name of his employer or the contents of the box, but was advised that if the box contained an obscene film and he crossed state lines, he would be in violation of federal law. Newman returned to the motel and left the box there when he returned to Florida the next day. Hester obtained a search warrant for the box and after he seized and opened it found that it contained two prints of Deep Throat and did not contain the film "The Devil In Miss Jones."

The district judge ruled reluctantly that Arnone had standing but finding probable cause he upheld the validity of the search warrant, and the seizure of the film on the plain view doctrine. *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971); *United States* v. *Wasserstrom*, 571 F. 2d 351 (6th Cir. 1978).

In our opinion, Arnone lacked standing to object to the search of property owned by a corporation in which he was a shareholder, *United States* v. *Curtis*, 537 F. 2d 1091 (10th Cir. 1976), *cert. den.*, 429 U. S. 962 (1976), and for the addi-

tional reason that the box containing the film had been abandoned by Newman who had custody of it. *United States* v. *Haddad*, 558 F. 2d 968 (9th Cir. 1977). We agree that the search warrant and the seizure were valid.

VI

Was More Than One Conspiracy Alleged In the Indictment And Proven At The Trial?

It is clear that the indictment alleged only one conspiracy namely to transport an obscene film in interstate commerce. The conspiracy did not relate to merely one shipment to a particular place but was national in scope and related to many shipments made to different states. The appellants are seeking to apply a different conspiracy for each shipment.

Whether or not a single or multiple conspiracies were involved is a factual question which the court properly submitted to the jury. The jury verdict obviously is supported by overwhelming evidence and was approved by the district court. *United States* v. *Porter*, 441 F. 2d 1024 (8th Cir. 1971), *cert. den.*, 404 U. S. 830 (1971); *United States* v. *Varelli*, 407 F. 2d 735 (1969).

In *United States* v. *Sandy*, 605 F. 2d 210 (6th Cir. 1979), *cert. den.*, 444 U. S. 984 (1979) we upheld a similar national conspiracy conviction.

VII

The Admissibility Into Evidence Of Statements In Furtherance Of The Conspiracy

This issue was raised by Louis Peraino, Bryanston and Damiano Films and relates to the testimony of Janice DeSalvo, the wife of one of the co-conspirators, Robert DeSalvo, who was convicted in the first trial and the testimony of Barbara Stamp, a general secretary who had a close relationship to Robert DeSalvo.

Before admitting the testimony, in view of objections, the district court conducted a voir dire of each witness in the absence of the jury. The district court excluded certain statements made by Janice DeSalvo as to Louis Peraino, but admitted the remainder of her statements as well as the statements of Barbara Stamp as being in furtherance of the conspiracy. *Campbell* v. *United States*, 415 F. 2d 356 (6th Cir. 1969).

In our opinion, the district court ruled correctly. It should also be noted that there was abundant other evidence linking each of said appellants with the conspiracy, so that any error in the admission of such testimony was not prejudicial.

VIII

The Closing Argument Of The Assistant United States Attorney To The Jury.

Appellants Louis Peraino, Bryanston and Damiano Films contend that this argument was improper and denied them of due process of law.

The second trial had lasted more than five weeks and the first trial lasted nine weeks. Both were bitterly contested. The eleven defendants in the second trial were represented by five attorneys. The government had only one attorney. Each attorney presented his views to the jury vigorously. Timely objections to parts of the closing argument were not made. As to the necessity of timely objections, see *United States* v. *Renfro*, 600 F. 2d 55 (6th Cir. 1979); *United States* v. *Black*, 480 F. 2d 504 (6th Cir. 1973). When timely objections were made, the court gave curative instructions to the jury.

The closing argument of the Assistant United States Attorney to the jury is not to be considered isolated from the arguments of the defendant's five lawyers who were forcefully representing their clients but must be read in connection therewith. When so considered, we are of the opinion that the closing argument was properly responsive to the argu-

ments of appellant's lawyers and indeed much of it was provoked thereby.

Furthermore, in view of the overwhelming evidence of guilt, we find no prejudicial error.

IX

No Error In The Admission In Evidence Of Certain Proof Or In The Exclusion From Evidence Of Certain Incomparable Materials

Appellants contend that the trial court improperly admitted evidence of an IRS investigation. The trouble with this contention, however, is that the subject was first injected into the case by appellants. This evidence was presented in the form of testimony by an IRS agent and was intended to show that a number of appellants met together at different times. Specifically, IRS Agent Brown testified that he had observed a number of meetings involving appellants Arnone, DeSalvo, Louis Peraino, and others during the course of his investigation. The scope of the evidence was restricted by the court.

Appellants further contend that it was improper to admit evidence that Deep Throat had been seized by law enforcement agents in New Orleans. This proof was offered by the government to show scienter. Appellants argue that the element was not in dispute. It surely was in dispute as it was contended on appeal that the government failed to prove that all of the appellants knew the film was obscene. The admission of proof of other films dealing with sex, the use of fictitious names in shipping the movie, and the destruction of records was admissible to show scienter.

Finally, appellants contend it was improper to admit proof of pandering, i.e. that the movie was a low budget film, produced by persons who had before made low budget sex films, and the movie was advertised to exploit sex. The government contended that this was offered to show that appellants intended the film to appeal to the prurient interests.

As the Supreme Court has indicated, in *Ginzburg* v. *New York*, 383 U. S. 463, 470 (1966):

> Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in determination of obscenity.

See also, Hamling v. *United States*, 418 U. S. 87, 130 (1974).

It is further contended that the district court improperly refused to allow the jury to view slides utilized by defendants' expert in the course of sex education programs in the Memphis area.

Appellants contend the slides should have been admitted, the expert having testified that they were comparable to scenes depicted in Deep Throat. The district court, after having conducted a hearing on the issue, held otherwise. Though the court conceded that part of the activity depicted in the slides was somewhat similar to that depicted in the movie, the court felt that the slides manner of presentation and the audience for whom they were intended were sufficiently different so as to be of no probative value on the issue of community standards. We find no abuse of discretion in the ruling of the district court on the admissibility of this evidence.

X

The Court's Instructions To The Jury

After two long trials, the court was very familiar with the issues involved and spent considerable time with counsel in the careful preparation of its instructions.

In considering these issues, the instructions of the court must be viewed in their entirety and when so considered, we find no prejudicial error.

The appellants raise the following issues:

Whether the instructions to the jury were proper with respect to (a) community standards, (b) withdrawal from

the conspiracy, (c) circumstantial evidence, (d) expert witnesses and the credibility of witnesses, (e) "utterly without redeeming social value", and (f) pandering.

Sub-issue (a): Appellants contend that the court incorrectly refused to instruct the jury that obscenity should be determined by national standards, i.e. what the nation, as opposed to some locality would determine to be obscene. This argument is wholly without merit. *Miller* v. *California*, 413 U. S. 15 (1973); *United States* v. *Sandy*, 605 F. 2d 210, 217-18 (6th Cir. 1979).

Appellants Arnone and Battista challenge the instruction on "community standards" which was as follows: (portions underlined are the parts they find objectionable)

> Contemporary community standards are set by what *is in fact accepted* in the community as a whole, that is to say, by society at large or people in general, and not by what some persons or groups of persons may believe the community as a whole ought to *accept*. Customs change and that the *community as a whole may* from time to time find *acceptable* that which was formerly unacceptable and not infrequently *may find presently acceptable* that which some particular group of the population may regard as unacceptable appeal to prurient interest.

In essence, appellants argue that obscenity does not depend on what the community finds acceptable (that is, what the community approves of) but what the community is willing to tolerate. The argument is, however, misplaced. In *Miller*, the court stated:

> The primary concern with requiring a jury to apply the standard of "the *average* person, applying contemporary standards" is to be certain that . . . *it will be judged by its impact on the average person.*

Miller v. *California*, 413 U. S. at 30 (emphasis added). In short, the concern is indeed on the materials impact upon

the community, as measured by the average member of the community. This point is made even clearer in *Jenkins* v. *Georgia*, 418 U. S. 153 (1974), where the court noted that *Miller* requires triers of fact

> . . . . to decide whether the average person . . . would consider certain materials prurient.

Sub-issue (*b*): Appellants Louis Peraino, Bryanston and Gerard Damiano Film Prod. appear to argue that the instruction on withdrawal from a conspiracy placed the burden of proving withdrawal on the defendant. Appellant Arnone argues that the instruction was incorrect because, after telling the jury that withdrawal requires "definite and decisive steps to disassociate himself fully and completely from the conspiracy," the court gave an example: "For example, a defendant may withdraw by making a clean breast to the authorities or by communicating to his co-conspirators his abandonment . . . by some effective means." Arnone argues that this example might lead the jury to believe that only such dramatic conduct will indicate withdrawal. Considering the instruction in its entirety does not lead to any such conclusion.

We have held that withdrawal is an affirmative defense. *Blue* v. *United States*, 138 F. 2d 351 (6th Cir. 1943). It must be proved by the defendant. *United States* v. *Borelli*, 336 F. 2d 376 (2nd Cir. 1964); *United States* v. *Nowak*, 448 F. 2d 134 (7th Cir. 1971).

We have held that withdrawal requires proof of affirmative action to disavow or defeat the purposes of the conspiracy. *Blue* v. *United States, supra.* The instruction given by the court was in accord with the law of this circuit and was not misleading.

Sub-issue (*c*): Appellants argue that the district court incorrectly refused to instruct the jury that proof by circumstantial evidence of some element of the crime requires the government to disprove "every reasonable theory except the

theory of guilt." Appellants rely on *United States* v. *Leon*, 534 F. 2d 667 (6th Cir. 1976) where this court held that "a verdict of guilty cannot stand on appeal where the evidence at most establishes no more than a choice of reasonable probabilities." In the present cases, the evidence established much more than the mere choices referred to in *Leon*. Furthermore, *Leon* does not require a special instruction on circumstantial evidence. The instruction given by the court was the standard instruction on circumstantial evidence. The Supreme Court has indicated there is no difference between circumstantial and direct proof. *Holland* v. *United States*, 348 U. S. 121 (1954). Also, the convictions in the present case were not based entirely on circumstantial evidence, but on direct evidence as well.

Sub-issue (*d*): Appellants contend that it was improper for the district court to instruct the jury that it need not accept the opinion of an expert. Appellants cite no case which in any way supports this view. Certainly, expert testimony is not required in an obscenity case, and the instruction was the standard one given to make sure the expert does not invade the province of the jury.

Sub-issue (*e*): Appellants contend that the judge's instruction ("if you find beyond a reasonable doubt that the film Deep Throat does not have the slightest redeeming social importance, you may find that the movie is utterly without redeeming social value.") was improper. They do not indicate why this instruction is improper, and we find nothing incorrect in it.

XI

The Trial Court Did Not Abuse Its Discretion In Denying A Mistrial Prior To The Christmas Recess.

Appellants complain about the court's denial of their motion to declare a mistrial when the jury was deadlocked in their case and in the case of one other defendant just prior to the

Christmas holiday recess and the court had given a modified *Allen* charge to the jury.

The jury had previously on December 22, 1978, returned verdicts of not guilty as to defendants Miragliotta and Novello and guilty verdicts as to appellants Gerard Damiano Productions, Louis Peraino, Bryanston Distributors, Inc., T. Anthony Arnone and Anthony Battista.

At the time the motion for a mistrial was being argued to the court on December 22, 1978, the jury returned a verdict of not guilty in favor of Mario DeSalvo. The jury after the Christmas holidays was unable to agree on a verdict in the case against Michael Cherubino and a mistrial was declared and the indictment against him later was dismissed.

In discussing this topic, complaint is made about pretrial publicity including newspaper articles quoting the prior United States Attorney and his Assistant, television cameras located at one time outside of the courtroom about 18 feet distant therefrom and later removed from the floor on which the courtroom was located, prior to taking of testimony in the case.

As to pretrial newspaper publicity there is no question but that the trial generated publicity although it appeared that more publicity was generated at the first trial than at the second trial. Most of the publicity was reporting by newsmen directed at the film Deep Throat rather than at the defendants. It was not hostile or prejudicial to the defendants. Prior to the second trial, the court determined after a hearing that the indictment should not be dismised nor should the case be transferred. It would be difficult to find a place in Tennessee for transfer of the case where newspaper or television publicity had not permeated.

It is clear that there was no showing of any prejudice on the part of the jury trying the case. Jury selection was carefully handled by the court and counsel. It took a long time. Each juror was questioned individualy on pretrial publicity. All of the defendants were satisfied with the jury.

The performance by the jury was excellent. There was no claim made of jury misconduct. The jury acquitted some of the defendants and convicted others. They gave careful consideration to the issues of the case. There was no proof of juror prejudice against any of the defendants.

We find no prejudice to the defendants occasioned by the television cameras located originally 18 feet from the courtroom door and then later removed from the floor on which the courtroom was located. At the time that the cameras were removed from the entire floor, the first witness in the case had not been called.

It was within the sound discretion of the district court whether to declare a mistrial. In our opinion, that discretion was not abused.

XII

We find no error in the moderate sentence of Louis Peraino to a term of three years, to serve only six months with the execution of the balance suspended and placed on probation for the balance of the sentence and a fine in the amount of $10,000. A previous sentence which was illegal under 18 U. S. C. § 3651 was set aside and he was given a correct sentence permitted by the statute.

We are also of the opinion that the conditions of probation as to defendants were permitted as a matter of grace, since it relates to the protection of the public and to the rehabilitation of the defendants .

The judgments of conviction and sentences are hereby affirmed.

APPENDIX B

Appendix B—Opinion of the Court of Appeals (companion case)

No. 79-5081

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH PERAINO and PLYMOUTH DISTRIBUTORS, INC.,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed April 6, 1981

Before: WEICK, LIVELY and KENNEDY, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court in which KENNEDY, Circuit Judge, joined. WEICK, Circuit Judge, (pp. 12-13) filed a separate dissenting opinion.

LIVELY, Circuit Judge. The appellants, along with nine other defendants, were indicted and tried by a jury at Memphis in the Western District of Tennessee for conspiracy to violate federal obscenity statutes, 18 U.S.C. § 1462 and § 1465, by transporting the film "Deep Throat" in interstate commerce. At a joint trial the defendant Joseph Peraino was found guilty, sentenced to 18 months with all but 6 months suspended and fined $10,000; Plymouth Distributors, Inc. was fined $8,000. Five other defendants were found guilty, three were acquitted by the jury and the charges against one were dismissed when the jury was unable to agree as to him.

The appeals of the seven defendants convicted by the jury

were consolidated and oral arguments were heard from all counsel. In a decision filed today the court unanimously affirmed the convictions of all but Joseph Peraino and Plymouth Distributors, Inc. *United States* v. *Battista, et al.*, — F.2d — (1981). Joseph Peraino (hereinafter Peraino) and Plymouth Distributors, Inc. (hereinafter Plymouth) raised an issue common only to themselves, and the panel determined that a separate opinion is required to deal with this issue.

The film was shown in Memphis in February 1974 and the first indictment was returned there on August 15, 1974. Peraino and Plymouth were not named in the indictment. However, in a superseding indictment returned on June 13, 1975, these defendants were named, along with others, as members of a conspiracy to violate 18 U.S.C. § 1462 (transportation of obscene matter) and 18 U.S.C. § 1465 (transportation of obscene matter for distribution). The indictment alleged overt acts in Memphis only in connection with the film being shown there, none later than March 1974, and later overt acts elsewhere as part of a national conspiracy to transport "Deep Throat" interstate up to the time of the indictment.

There was no evidence linking Peraino and Plymouth with any of the co-conspirators or with the film itself until at least eight months after the Memphis showing. In October 1974 Peraino was seen in Florida with some of the co-conspirators. In November 1974 he received three $275 checks, not shown to be connected with "Deep Throat," from the New Jersey office of the film distributor which handled other films as well as "Deep Throat." The evidence showed that Peraino took over the distribution of the film in December 1974 and moved the distribution center from Florida to New Jersey. He formed Plymouth for the purpose of distributing the film in Pennsylvania, Connecticut, New Jersey and Maine. There was evidence he did not intend to distribute the film in communities where it would offend or cause legal problems. So far as the evidence shows, Peraino and Plymouth had no relationship with the prior distributors of the film other than

that in December 1974 they employed two unindicted co-conspirators who had been engaged in the earlier Memphis showing and retained a lawyer who had been involved in production of the film. There was no evidence that the film was ever transported to or through the Western District of Tennessee or that any overt acts took place there after Peraino and Plymouth took over distribution. There was no evidence that the community standards of any community to which they did transport the movie were violated.

Peraino and Plymouth assert that they were denied First Amendment and due process rights by being required to stand trial in the Western District of Tennessee. They contend that there is no venue "where, during the course of a particular defendant's actual participation in the alleged conspiracy, it was not an objective of the conspiracy to distribute the allegedly obscene material within the Federal district." They argue that "expression" may be suppressed as obscene only in those places where it is found so under local community standards. Since these standards vary from place to place, due process is violated by enforcing a venue provision which has the effect of basing conspiracy convictions under §§ 1462 and 1465 on the standards of a community with which the defendant has had no contact. The government responds that under settled conspiracy law each person who joins is held responsible for prior acts of all conspirators in furtherance of the purpose of the conspiracy and that venue is properly laid in the district of any overt act.

Though Congress apparently recognized that obscenity posed a national problem in enacting 18 U.S.C. §§ 1461-1465, the Supreme Court has held that there is no national standard by which material can be judged to determine whether it is obscene. *Miller* v. *California*, 413 U.S. 15, 30-33 (1973). "To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *Id.* at 30 (emphasis in original). Instead, even in federal prosecutions for transporting allegedly obscene ma-

terials in interstate commerce, the material must be tested by "contemporary community standards." *Hamling* v. *United States*, 418 U.S. 87, 104-07 (1974). As a practical matter this becomes the standard of the "community" from which the jury is drawn.

> [T]he prosecution need not as a matter of constitutional law produce "expert" witnesses to testify as to the obscenity of the materials . . . . A juror is entitled to draw on his *own* knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination . . . .

Id. at 104 (emphasis added).

> Since this case was tried in the Southern District of California, and presumably jurors from throughout that district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.

Id. at 105-106. As Justice Brennan explained, "It may be that the Court's unarticulated assumption is that jurors instructed to apply 'national' standards will inevitably apply the standards of their local community, because national standards are simply 'unascertainable.'" *Id.* at 151 n.5 (dissenting opinion). That community standards will vary throughout the nation may be said to serve the principles of the First Amendment.

> The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes, a point which Mr. Justice Harlan often emphasized.

Miller, supra, 413 U.S. at 32 n.13. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33.

Venue for federal obscenity prosecutions lies "in any district from, through, or into which" the allegedly obscene material moves, according to 18 U.S.C. § 3237. This may result in prosecutions of persons in a community to which they have sent material which is obscene under that community's standards though the community from which it is sent would tolerate the same material. *See United States* v. *Blucher,* 581 F.2d 244 (10th Cir. 1978), *vacated,* 439 U.S. 1061 (1979).

When this liberal venue rule is applied in a prosecution for conspiracy to violate the federal obscenity laws, as in the present case, a constitutional issue is presented. The material is entitled to First Amendment protection except where it violates community standards. Here, in addition to distributing "Deep Throat" in Memphis, where it was illegal, the conspirators were engaged in its distribution in other communities where it was not shown to be illegal, and therefore is presumed to be legal. Venue in an obscenity conspiracy case must be based on the allegedly obscene material once being present in the district, 18 U.S.C. § 3237, and either on the conspiracy being formed there or on an overt act taking place there, *see Brown* v. *Elliott,* 225 U.S. 392, 400 (1912). A person who enters into an agreement to distribute the material after the venue-setting act is not constitutionally subject to prosecution in the district of venue in the absence of some subsequent act or agreement related to the district of venue or another district in which the material is found to be obscene. One who has no connection with the district of venue at the time of the venue-setting act may not be convicted there for subsequently transporting the materials into other communities whose standards were not established. Merely joining the conspirators in their lawful distribution efforts in other communities after the film was no longer being

shown in Memphis does not evidence intent to further or advance the illegal purpose of the conspiracy to ship the film into Memphis. Absent any evidence of adherence to the criminal purposes of the conspiracy, defendants Joseph Peraino and Plymouth Distributors cannot be held to have become members of the conspiracy. *See United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443 n. 20 (1978) (intent to effectuate the object of a conspiracy is a necessary element of membership in the conspiracy); LaFave & Scott, *Criminal Law*, 470 (1972).[1] Yet, that is exactly what happened in the present case.

The general rule that one who joins a conspiracy at any time before it ends may be held responsible for acts and agreements which took place before he joined, *e.g.*, *United States* v. *Cimini*, 427 F.2d 129, 139 (6th Cir.), *cert. denied*, 400 U.S. 911 (1970), does not control when First Amendment rights are at stake. In most cases the illegal purposes of a federal conspiracy will be illegal in every federal jurisdiction. However, when the agreement alleged is one to distribute materials which constitute expression, the agreement may have both legal and illegal purposes depending on varying community standards.[2] Where one joins an ongoing undertaking to distribute expressive materials interstate he should not be convicted solely on the basis of agreements and overt acts which

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[1] It is unusual to have conduct which is legal in one state and illegal in another. However, application of the community standards test leads to that result in the case of obscenity. The Supreme Court has recognized that material may be proscribed in one community but not in another, and that the courts must recognize the rights of the diverse communities. *Miller*, *supra*, 413 U.S. at 32-33.

[2] This is not to say that the government must prove that the conspirators had actual knowledge that the film was obscene. The scienter sufficient to support a conviction is that they knew the general "character and nature" of the film. *Hamling*, *supra*, 418 U.S. at 123. We do hold that to convict one as a conspirator it is necessary to prove that a purpose of the conspiracy, at the time the conspirator was a member, involved a community, the standards of which were violated by the film.

pre-dated his joining.[3] In order to avoid violation of such person's First Amendment rights, the government is required to prove either that he agreed to distribution of material to communities where it would be found obscene or permitted such future distribution to occur and failed to withdraw from the conspiracy.

The government relies primarily upon *Hamling* v. *United States, supra,* and *United States* v. *Sandy,* 605 F.2d 210 (6th Cir.), *cert. denied,* 444 U.S. 984 (1979), in arguing that Peraino and Plymouth could be tried and convicted under the Memphis community standards for agreements and acts which long pre-dated their involvement with "Deep Throat." Both cases are distinguishable. In neither case did any of the conspirators join the conspiracy after the acts occurred upon which venue was based. In *Hamling* conspiracy and venue questions were not at issue. In *Sandy,* this court held that the district court was not required to apply a multitude of local standards, depending on the distribution area which each distributor served. It stated:

> Having voluntarily chosen to enter a conspiracy of national scope, appellants limited their right to be tried according to the standards of the localities in which their operations are centered.

Id. at 218. The quoted language does not answer the question raised in the present case because all of the conspirators in *Sandy* were members at the time of the mailing of material into a community where it was obscene by local standards. What *Sandy* establishes is that a member of a con-

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[3] Even under general conspiracy law where a conspirator is held responsible for acts of the conspiracy before he joined, it is still necessary to show an overt act of one of the conspirators "thereafter." *United States* v. *Thompson,* 533 F.2d 1006, 1009 (6th Cir.), *cert. denied,* 429 U.S. 939 (1976). In the present case, although overt acts were alleged after Peraino and Plymouth began distribution, none was shown to violate the standards of a community in which it took place.

spiracy may be tried and convicted under the community standards of a jurisdiction to which obscene materials are sent while he is a member of the conspiracy, though an individual conspirator need not have been personally involved in any of the venue-setting acts. This is so because every conspirator is liable for acts of other conspirators designed to further the purpose of conspiracy. In *Sandy* that purpose included distribution at the place of trial after each conspirator had joined. The only respect in which Peraino and Plymouth may be considered part of the ongoing conspiracy is that they continued the interstate distribution of "Deep Throat" after December 1974. However, there was no evidence that they agreed with anyone to distribute it to communities under whose standards it would be obscene. In fact, the only evidence is just the contrary.

The present case clearly is not controlled by *Sandy*. That case involved a "wheel" type conspiracy. The district court in *Sandy* found that individual conspirators who were subdistributors of a film ("spokes" of the wheel) owned by another distributor (the "hub" of the wheel) had agreed among themselves that they would forward the film to other communities if requested rather than return it to the "hub" after showing it. This agreement provided the "rim" of the wheel and tied all the conspirators together in a common enterprise. 605 F.2d at 216. This court held:

> Once the conspiracy *to which they belonged* was shown to have extended to and operated in Memphis, the defendants had no right to have the obscenity of the film tried according to the community standards of other localities . . . .

Id. at 217 (emphasis added). Again, there was no issue in *Sandy* of the liability of one who joined the conspiracy after the last overt act in Memphis occurred. Insofar as Peraino and Plymouth are concerned, they were part of a "chain" rather than a "wheel" conspiracy. *Sandy* affirmed that each con-

spirator need not have personal contact with the *place* involved in the indictment. It did not concern the question of membership in the conspiracy at the *time* of the venue-setting act.

Though the reasons for its summary reversal are not clear, the Supreme Court's action in *Blucher* v. *United States, supra,* does raise a question which is pertinent to this case. In *Blucher* an Oregon postmaster requested a Wyoming postmaster to solicit materials by mail, under a false name, from an Oregon resident. There was no apparent reason for this strategem except the possibility that a Wyoming venire would apply a more restrictive community standard than one drawn from the Oregon district. The defendant was indicted under § 1461 and tried in Wyoming. His only contact with Wyoming consisted of mailing the materials to that state. Blucher was convicted and the Tenth Circuit, on the basis of *Hamling, supra,* affirmed with obvious misgivings. 581 F.2d 244 (1978). The Supreme Court vacated the judgment and remanded with directions that the indictment be dismissed. 439 U.S. 1061 (1979). Since similar government conduct – solicitation of materials by a postal inspector using a false name – had been approved by the Court in *Smith* v. *United States,* 431 U.S. 291 (1977), it may be presumed that the government's blatant forum shopping, not present in *Smith* or *Hamling,* was the reason for reversing *Blucher.* If so, the present case is much stronger for reversal. The defendant in *Blucher* did mail into Wyoming matter which a jury there found to offend community standards. Peraino and Plymouth Distributors had nothing to do with "Deep Throat's" Memphis presence.

The government offered no proof of the community standards to which Peraino and Plymouth caused "Deep Throat" to be sent. The court's instructions allowed the jury to apply standards of the jury's own community. Thus we do not reach the question of whether venue in the Western District of Tennessee could have been upheld by submitting to a jury of

that district the issue of whether "Deep Throat" offended the standards of any other community – without regard to the standards of the trial district – to which these defendants agreed to transport the film.[4] There is serious doubt, however, that a jury of one district could properly determine the standards of another community solely on the basis of expert testimony. *See Hamling, supra,* 418 U.S. at 151 n. 5 (dissenting opinion); *United States* v. *Elkins,* 396 F.Supp. 314, 316, 318 (C.D. Cal. 1975); *United States* v. *Mohney,* 476 F.Supp. 421 (D. Hawaii 1979). In *Mohney* the court stated:

> Inherent in *Miller* and *Hamling* is the idea that jurors are drawing on personal knowledge of their own community. While expert opinions may be relevant, jurors are completely free to disregard all expert testimony. If jurors cannot draw on personal knowledge, the idea of local community standards is a *totally* useless concept. A jury from the District of Hawaii cannot determine the community standards of the Eastern District of Michigan.

Id. at 426-27 (emphasis in original). This language points out the inherent difficulty of attempting to prosecute national conspiracies under the federal obscenity statutes in a single district.

One statement in the dissent requires a reply. The dissent states that "the stipulation entered into by all the parties clearly established venue in the Western District of Tennessee." The stipulation was not so broad. As quoted in the opinion of the court in the companion cases (*United States* v. *Battista, et al.*, decided this date) the stipulation merely related to activities of the three grand juries of the Western District of Tennessee which investigated the showing of "Deep

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[4] We recognize that the district court might "be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide." *Hamling, supra,* 418 U.S. at 106.

Throat" in Memphis. This investigation resulted in the indictments in this and the companion cases. It is clear that the appellants Peraino and Plymouth vigorously challenged venue throughout the district court proceedings. This is shown by a pretrial motion (appendix, p. 160) with supporting memorandum (appendix, p. 173) and a similar post-trial motion (appendix, p. 282). Further, in its instructions the district court advised the jury of the position of these appellants on this issue (appendix, p. 2700).

The convictions of Joseph Peraino and Plymouth Distributors, Inc. are reversed with directions to dismiss the indictments against them.

WEICK, Circuit Judge, dissenting:

I respectfully dissent.

Joseph Peraino and Plymouth Distributors, Inc. contend principally that the district court did not have venue jurisdiction over them since they had joined the conspiracy some eight months after the obscene film Deep Throat had been shown in Memphis. They argue that if each district where the film previously had been distributed had jurisdiction that this would subject them to varying community standards the details of which they had no knowledge and in violation of their constitutional rights. They offered no proof, however, of different community standards except self-serving statements and opinions from their own past employees. Here the conspiracy in which these defendants joined was of national scope even though they later restricted the territory in which they operated. *Hamling* v. *United States*, 418 U. S. 87 (1974); *United States* v. *Sandy*, 605 F. 2d 210 (6th Cir. 1979), *cert. den.*, 444 U. S. 984 (1979). These defendants never withdrew from the conspiracy.

Their contentions conflict with the fundamental law of conspiracy. A conspirator need not join a conspiracy at its inception, in order to become liable as a conspirator. When he joins the conspiracy, he is bound by the prior acts and statements of other conspirators made in furtherance of the common objective which, in this case, was the distribution of an obscene movie Deep Throat in interstate commerce. *United States* v. *Cimini*, 427 F. 2d 129 (6th Cir. 1970), *cert. den.*, 400 U. S. 911, *reh. den.*, 400 U. S. 984 (1971). These defendants as the jury found had full knowledge of the details of the obscene film and of community standards. The government, however, was not required to prove that each conspirator was familiar with each and every detail of the conspiracy. *United States* v. *Mishkin*, 317 F. 2d 634 (2nd Cir. 1963), *cert. den.*, 375 U. S. 827 (1963). From the time that the agreement is entered into, the crime of conspiracy is

a continuing crime from its inception to its conclusion. Prosecutions for conspiracy may be made either where the conspiracy was formed or where any overt act in furtherance of the conspiracy was committed. *United States* v. *Downing*, 51 F. 2d 1030 (2nd Cir. 1931). Even an overt act not pleaded in the indictment may be used. *Brown* v. *Elliot*, 225 U. S. 392 (1912); *United States* v. *Downing*, 51 F. 2d 1030 (2nd Cir. 1931). Only slight evidence is necessary to connect a defendant with a conspiracy. *United States* v. *Chambers*, 382 F. 2d 910 (6th Cir. 1967).

The stipulation entered into by all of the parties clearly established venue in the Western District of Tennessee. These defendants are bound by their stipulation.

Joseph Peraino was no novice. As the majority concedes, Peraino took over the distribution of the film in December 1974 and moved the distribution center from Florida to New Jersey. He organized Plymouth Distributors, Inc. for the purpose of distributing the film in Pennsylvania, Connecticut, New Jersey and Maine. The jury was fully justified in finding these defendants knowledgeable in every particular. I find no basis for carving out an exception to the well established rule of conspiracy which would exempt these defendants from the consequences of their knowledgeable acts. I would affirm these convictions.

No. 79-5081

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. ORDER

JOSEPH PERAINO AND
PLYMOUTH DISTRIBUTORS, INC.,

Defendants-Appelles

The slip opinion decided and filed by the Court in the above-captioned matter on April 6, 1981 is amended to read as follows:

On page 9 of the opinion, the first sentence of the paragraph beginning six lines from the bottom of the page is to read, "The government offered no proof of the community standards of any community to which Peraino and Plymouth caused 'Deep Throat' to be sent.

ENTERED BY ORDER OF THE COURT

/S/
Clerk

FILED

APR 24 1981

JOHN P. HEHMAN, Clerk

APPENDIX C

**Order Denying Rehearing
In Companion Case**

Case Nos. 79-5165/79-5257

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America, *Plaintiff-Appellee*, v.
Anthony Battista (79-5165) and
T. Anthony Arnone (79-5257) *Defendants-Appelles*

ORDER

Before WEICK, LIVELY and KENNEDY, Circuit Judges.

Upon consideration of the Consolidated Petition For Rehearing filed by Defendants-Appellants Anthony Battisti and T. Anthony Arnone, it is ORDERED that said Consolidated Petition For Rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK

/S/
Chief Deputy Clerk

FILED

JUN 12 1981

JOHN P. HEHMAN, Clerk

APPENDIX D

Opinion and order of District Court Concerning Grand Jury Procedures United States v Peraino et al.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

United States of America v. Anthony Joseph Peraino et al.
No. CR-75-91

ORDER

The Court has previously taken under advisement a motion by defendants to dismiss the indictment in this case on the basis of an improper composition of the grand jury returning the indictment and on the basis that the grand jury allegedly has not viewed the film in controversy. Further, the defendants have moved to dismiss the indictment on the basis that the prosecution stated the wrong standards or consideration to the grand jury as to the question of obscenity regarding the film, "Deep Throat."

The Court has ordered that evidence be produced with regard to these matters, although this has been ordered with considerable reluctance in view of the secret nature of grand jury proceedings and the Court's reluctance to interfere with and/or to review the details of grand jury proceedings.

There is a presumption as to the regularity of grand jury proceedings. The indictment itself is the substantial evidence with regard to the proceedings and the nature of instructions given the grand jury. *Hamling* v. *United States*, 418 U.S. 87 (1974).

Appendix D—Opinion and order of District Court Concerning Grand Jury Procedures United States v Peraino et al.

In connection with the consideration of this motion, a stipulation was presented to the Court, the effect of which was to indicate that at different times the grand jury in 1974, or a part of the members of the grand jury, viewed the film in its entirety. The Court here is concerned, however, only with the superseding indictment, No. CR-75-91, and with regard to the proceedings before this particular grand jury. What may have transpired with regard to the prior grand jury in 1974 is not material nor controlling with regard to a disposition of this motion.

The Court finds that the grand jury was properly constituted in 1975 when this indictment was returned and than the life of the grand jury was extended in accordance with the requirements of law. Further, it is undisputed that the grand jury in question did not view the film, "Deep Throat." The foreman of the grand jury testified that he himself had previously viewed it and that apparently two other members of the grand jury had likewise previously viewed the film, but it was not shown to them during the course of grand jury proceedings. He further testified, however, that an FBI agent testified in detail, setting forth graphic scene-by-scene descriptions of the film and that he accurately set out all of the contents of the film, including the various sexual acts. The substance of the FBI agent's review of the matter is set out on an FBI form and is set out on the atached "Exhibit 1".

> "The validity of an indictment is not affected by the character of the evidence considered. Thus an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence..."

Appendix D—Opinion and order of District Court Concerning Grand Jury Procedures United States v Peraino et al.

United States v. *Calandra*, 414 U.S. 338, 344 (1974).

No authority has been cited to this Court to the effect that the failure to show the film itself to a grand jury is a basis for dismissal of the indictment. It appears here that an adequate and full recitation of the substance of the film was presented to the grand jury and that individual members of the grand jury, including the foreman, were in a position to corroborate the nature and effect thereof.* Hearsay testimony is valid before a grand jury, although in an obscenity case, it is desirable that the material itself which is in question should be viewed by the grand jury. *See United States* v. *Estepa*, 471 F. 2d 1132 (2d Cir. 1972).

The foreman of the grand jury was unclear with regard to the nature of instructions given to the grand jury regarding the tests to be applied to determine obscenity. He did note that he recalled that children may have been mentioned. The government representatives had no recollection as to whether or not children were mentioned as a part of the standards. *See Pinkus* v. *United States*, U.S. , 98 S.Ct. 1808 (1978).

It is obvious, however, that a lay member of a grand jury could have no accurate recollection as to the details of instructions regarding the standards of obscenity which may have been given three and one-half years prior to testifying. The Court gives little credence to the substance of this witness' testimony regarding the content of any instructions or directions given regarding the tests. The indictment

*The FBI agent or agents could not recall specifically the nature of their testimony before the grand jury.

itself sets out appropriately the *Miller* standards in accordance with *Miller* v. *California*, 413 U.S. 15 (1972).

It was further stipulated that the Assistant United States Attorney and/or government representatives who might have appeared before the grand jury had no recall as to whether or not children were mentioned as a part of the average person in the community in applying standards to determine the content of the film in question, as to whether or not it was legally obscene.

The function of the grand jury is to determine whether or not there is probable cause to believe that an offense has been committed against the United States. In this case, the Court of Appeals for the Sixth Circuit has held specifically that under the *Miller* standards the film in question was obscene. *United States* v. *Marks*, 520 F.2d 913, 921 (6th Cir. 1975). After the remand of that case by the United States Supreme Court, *Marks* v. *United States*, 430 U.S. 188 (1977), the Sixth Circuit observed:

> "Under the standards of either *Roth* v. *United States*, 354 U.S. 476 (1957), *Memoirs* v. *California*, 413 U.S. 15 (1973), we conclude that a jury would be well within the discretion entrusted to it in finding that both films were obscene."

This reinforces the view that a grand jury might well determine from a recitation of the content of such a film and have a reasonable basis for believing that the obscenity laws had been violated.

Furthermore, even if a technically incorrect measure or standard of obscenity were given the grand jury, the indictment is valid on its face and it would appear sufficient to require a trial of the charge on the merits.

Costello v. *United States*, 350 U.S. 359 (1956); *United States* v. *Slepicoff*, 524 F.2d 1244 (5th Cir. 1975).

For the reasons indicated, the Court is of the opinion that the motions to dismiss the indictment on the basis of proceedings before the grand jury are insufficient as a matter of law.

Accordingly, the motions are overruled this 9th day of November, 1978.

HARRY W. WELLFORD, JUDGE
UNITED STATES DISTRICT COURT

Appendix E

Exhibit "I" Annexed to District Court Opinion

The plot of the motion picture film entitled "Deep Throat" concerns one LINDA LOVELACE who plays the part of an unmarried female who consults a physician regarding her failure to have an orgasm during sexual relations. The physician examines LINDA LOVELACE and reports that her clitoris is located in her throat instead of on her vagina. Following this diagnosis, LINDA LOVELACE performs fellatio on the physician and experiences an orgasm. The physician then hires LINDA LOVELACE as a physical therapist and sends her on house calls to various males who purport to have sexual problems. This film contains numerous scenes of fellatio, cunnilingus, coitus and anal intercourse, including scenes of male ejaculation. In one scene a male patient being treated by LINDA LOVELACE pours coca-cola into her vagina and thereafter drinks the coca-cola by means of a long plastic tube inserted into her vaginia. The sexual acts depicted are portrayed in explicit detail, including close-up scenes centering on the sexual organs.

APPENDIX F
United States v. Peraino, et al.
INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

From on or about the 26th day of February 1971 up to and including the present, in the Western District of Tennessee and divers other places,

ANTHONY JOSEPH PERAINO
ROBERT J. DeSALVO
T. ANTHONY ARNONE
HERBERT NITKE
MICHAEL CHERUBINO
LOUIS PERAINO
ANTHONY BATTISTA
JOSEPH PERAINO
CARL R. CARTER
MEL FRIEDMAN
HERBERT STREICHER
MARIO DeSALVO
BRYANSTON DISTRIBUTORS, Inc.
GERARD DAMIANO FILM PRODUCTIONS, Inc.
AMMA CORPORATION
MAINES & ASSOCIATES, Inc., and
PLYMOUTH DISTRIBUTORS, Inc.

hereinafter referred to as defendants generally or by specific name, and Anthony Albanese, Louis Albanese, Bill Albert, Art Theater Guild Inc., Norman Arno, James Barlock, Robert Bernstein, Larry Carr, Hank Cartwright, Archie Cavelli, Joseph Confora, John Crandall, Robert Cunningham, Gerard Damiano, Raymond Damiano, Fernando deCespedes, Ercole DeColla, Anthony Del Pra, Vincent DeStefano, Bob Doebel, Willis J. Doebel, Hubert England, Joao Fernandez, Rober Fiori, John Fortuna, Tom Frederick, Walter Gernert, Robert Gordon, Joseph Gougen, Great Scott Advertising Co., Bruce

Green, Alfred Gregg, Richard Haes, Jack Haggerty, Stu Harnell, Ed Hertzmark, Lloyd Hess, Arnold Himmelstein, Bill Higgins, Carl Jamroga, Arnold Jordan, John Kaboord, Ronald Kay, William Kendall, Robert Lane, John Pierre LeCoz, Terrance Levine, Vincent Maida, William V. Mallozzi, Carmen Mallzone, Philip Manier, Plato Manouse, Michael Mann, John Marrone, William Martin, Roy Meekins, Anne Miller, Larry Miller, Lynette Minton, Angelo Miragliotta, Vincent Miranda, Motion Pictures Accessories, Inc., Curtis Muck, Bill McLeese, Ed McLeese, James Newman, Anthony Novello, Anthony Oteri, Joseph Oteri, Angelo Palma, Phillip Parisi, Michael Pollack, Norman Reeb, Chuck Roe, Juanita Rossi, Pete Rossi, Sam Rossi, Steve Sabella, John Sangston, Gil Saule, Ron Schenk, Raymond Shipley, Stan Siebert, Arthur Sommer, Barbara Stamp, Barbara Stolyts, Herbert Streicher, Joseph Sykes, Louis Tabak, Phillip Teri, Joseph Torchio, Jr., Charles Traynor, Linda Traynor, Arthur Weisburg, Ronald Wertheim, Ross Wheeler, Thomas Wilson, and Italo Zoccollilio, and others whose names to the Grand Jury are unknown, named herein as co-conspirators but not as defendants, unlawfully combined, conspired, confederated, agreed and planned to engage in conduct against the laws of the United States by knowingly transporting in interstate commerce by common carrier and transporting in interstate commerce for the purpose of sale and distribution an obscene, lewd, lascivious and filthy motion picture film, that is one depicting patently offensive hardcore sexual conduct including lewd exhibition of genitals, masturbation and ultimate sex acts, which appeals to the prurient interest in sex and which exceeded and exceeds the standards of the average person applying contemporary standards relating to the depiction of sexual matters and which has no serious scientific, literary, artistic or political value, entitled "Deep Throat" in violation of Title 18, United States Code, § 1462 and § 1465.

Said conspiracy was initiated by an agreement between Gerard Damiano and Louis Peraino to form a business relationship between themselves for the purpose of distributing and producing for distribution sex oriented motion picture

films. Thereafter Gerard Damiano Film Productions, Inc. was formed to carry out this purpose. Once in business, said corporation acting by and through Gerard Damiano and Louis Peraino purchased a motion picture film entitled "Changes" and produced a motion picture film entitled "Sex U.S.A." and commenced distributing same for public exhibition. Thereafter, plans were initiated to produce a motion picture film which was one depicting patently offensive hard-core sexual conduct to include lewd exhibition of genitals, masturbation and ultimate sex acts, which appeals to the prurient interests in sex and which exceeded the standards of the average person applying contemporary standards relating to the depiction of sexual matters and which had no serious scientific, literary, artistic or political value, which was ultimately entitled "Deep Throat". Once produced, said motion picture film was distributed throughout the United States for public exhibition by Gerard Damiano Film Productions, Inc. In approximately November 1972, Bryanston Distributors, Inc. was incorporated by Louis Peraino and others. Gradually, thereafter Gerard Damiano Film Productions, Inc. was phased out of existence and primary responsibility for the distribution of "Deep Throat" shifted to AMMA Corporation in Florida and Bryanston Distributors, Inc. continued to receive money for these efforts of AMMA Corporation.

The object of said combination, conspiracy, confederation, agreement and plan was for the defendants and other co-conspirators to act in concert to achieve a common goal, to wit, to profit financially the defendants and other co-conspirators, by obtaining public notoriety for said motion picture film and the actor and actresses therein in order to and in furtherance of an effort to pander said motion picture film to the end that paying patrons would be enticed to attend public exhibitions of said motion picture film throughout the United States. Other goals of said combination, conspiracy, confederation, agreement and plan designed primarily to obtain and enhance the ultimate goal, including but was not limited to, soliciting sub-distributors and exhibitors, assisting exhibitors in advertising and pandering, delivery of prints of said motion picture film to theaters through-

out the United States, collecting monies and making all necessary business arrangements to physically place prints of said motion picture film in the possession of theater operators for exhibition to the public. It was a further goal of said combination, conspiracy, confederation, agreement and plan to promote said motion picture film and the actors, actresses and producers so as to create public name recognition, fame and acclaim for them.

At the times hereinafter mentioned, the following overt acts were engaged in to further and effect the goals of said combination, conspiracy, confederation, agreement and plan:

1. On or about February 26, 1971, Gerard Damiano, Louis Peraino and Vincent DeStefano incorporated Gerard Damiano Film Productions, Inc. in New York.

2. In approximately March 1971, Gerard Damiano and Louis Peraino purchased from Cinex Films a motion picture film entitled "Changes" later re-titled "All About Sex" and later re-titled "All About _____."

3. In approximately July 1971, Gerard Damiano and Louis Peraino produced for distribution a motion picture film entitled "Sex U.S.A."

4. In approximately the Fall of 1971, Gerard Damiano, Louis Peraino, Charles Traynor and Linda Traynor met together in New York, New York and agreed that Linda Traynor would play the female lead role in a motion picture film to be produced by Gerard Damiano and Louis Peraino later entitled "Deep Throat".

5. In approximately December 1971, Louis Peraino and Gerard Damiano entered into an agreement with Linda Traynor that in return for remuneration said Linda Traynor would play the female lead role in a motion picture film which was later entitled "Deep Throat".

6. In January 1972, Anthony Peraino travelled by automobile from New York, New York to Miami, Florida.

7. Between January 10, 1972 and January 19, 1972, Anthony J. Peraino, Linda Traynor, Charles Traynor, Gerard Damiano, Joao Fernandez, Ronald Wertheim and Herbert

Streicher travelled from New York, New York to Miami, Florida.

8. In approximately February 1972, Archie Cavelli developed an answer print of a motion picture later entitled "Deep Throat" at the instruction of Gerard Damiano.

9. In approximately February 1972, Phillip Parisi, as an employee of Gerard Damiano Film Productions, Inc. and under the instruction of Louis Peraino and Gerard Damiano commenced booking "Deep Throat" with exhibitors and subdistributors.

10. Between February 1972 and May 1972, Phillip Parisi entered into an agreement on behalf of Louis Peraino with Arnold Jordan on behalf of Art Theater Guild, Inc. allowing for Art Theater Guild, Inc. to distribute the motion picture film "Deep Throat" to the Studio Theater, Memphis, Tennessee for public exhibition.

11. In approximately May 1972, William Kendall in Memphis, Tennessee, acting on behalf of Art Theater Guild, Inc., ordered accessories including a film clip known as a "trailer" or "previews" of a motion picture film entitled "Deep Throat".

12. In May 1972, the film clip from the motion picture "Deep Throat" known as the "trailer" or "previews" was shown for public exhibition at the Studio Theater, Memphis, Tennessee.

13. In approximately April 1972, Louis Peraino paid Gerard Damiano approximately $15,000 for the interest of Gerard Damiano in Gerard Damiano FIlm Productions, Inc.

14. Between approximately May 1, 1972 and September 1, 1972, Phillip Parisi, on behalf of Gerard Damiano Film Productions, Inc., arranged with and for Ross Wheeler, on behalf of Wheeler Film Co., Washington, D. C., to act as a subdistributor of "Deep Throat".

15. In 1972, Louis Peraino granted permission to Joseph Torchio, Jr., Norman Arno and Vincent DeStefano to book and distribute "Deep Throat" in California.

16. In 1972, Phillip Parisi, as an employee and on behalf of Gerard Damiano Film Productions, Inc., booked and distributed "Deep Throat" for exhibition by Vincent Miranda in

theaters owned or controlled by him in Los Angeles, California.

17. In 1972, Gerard Damiano Film Productions, Inc. booked and distributed "Deep Throat" for exhibition and redistribution by Arthur Weisberg, acting by and through Gail Film Distributors, Inc., Detroit, Michigan.

18. In 1972, Phillip Parisi, as an employee and on behalf of Gerard Damiano Film Productions, Inc., granted Arnold Jordan, as an employee and on behalf of Art Theater Guild, Inc., permission to exhibit "Deep Throat" in theaters owned or controlled by Art Theater Guild, Inc. throughout the United States.

19. In 1972, Gerard Damiano Film Productions, Inc. granted permission to Hank Cartwright, acting for and on behalf of Las Vegas Cinemas, Inc., to exhibit "Deep Throat" in theaters owned or controlled by Las Vegas Cinemas, Inc.

20. In approximately December 1972, Arthur Sommer approached Phillip Parisi and Louis Peraino at Gerard Damiano Film Productions, Inc. seeking permission to obtain a copy of "Deep Throat" for exhibition at the Sheraton Theater, Miami Beach, Florida.

21. In January 1973, Arthur Sommer, as an exhibitor, played "Deep Throat" at the Sheraton Theater, Miami Beach, Florida.

22. In approximately March 1973, Robert Bernstein introduced Arthur Sommer to T. Anthony Arnone.

23. In approximately April 1973, T. Anthony Arnone requested of Arthur Sommer permission to exhibit "Deep Throat" in theaters owned by him in Florida.

24. In approximately April 1973, T. Anthony Arnone introduced Arthur Sommer to John Kaboord.

25. On or about May 1, 1973, Larry Carr was granted permission by Anthony Joseph Peraino to exhibit "Deep Throat" at the Cine I and Cine II theaters in Hollywood, Florida.

26. On or about May 15, 1973, John Kaboord exhibited "Deep Throat", having obtained same by permission of Arthur Sommer, in Pensacola, Florida.

27. Between June and August 1973, Anthony Joseph Peraino suggested that Robert J. DeSalvo and T. Anthony Arnone form a business relationship for the purpose of being the national distributors of "Deep Throat".

28. In approximately August 1973, Anthony J. Peraino consented to allow Robert J. DeSalvo and T. Anthony Arnone to distribute the motion picture film entitled "The Devil In Miss Jones" through the same channels as "Deep Throat".

29. On or about August 20, 1973, T. Anthony Arnone formed AMMA Corporation in the State of Florida.

30. In approximately September 1973, T. Anthony Arnone and Robert J. DeSalvo opened checking accounts in the name of Ivanhoe Film Distributors, Inc. and AMMA Corporation at American National Bank & Trust Company of Ft. Lauderdale, Ft. Lauderdale, Florida.

31. On or about October 1, 1973, Robert J. DeSalvo hired Robert Bernstein as an employee of AMMA Corporation to book "Deep Throat" and "The Devil in Miss Jones" for exhibition at theaters throughout the United States excluding bookings which would be in competition with the previously made arrangements more specifically set out in Overt Acts Nos. 15, 16, 17, 18 and 19 above.

32. On or about November 1, 1972, Bryanston Distributors, Inc. was formed as a corporation in New York, New York.

33. In the Fall of 1973, Michael Cherubino, acting for and on behalf of Anthony Peraino, assumed the non-official position of bookkeeper-non-supervisory overseer at AMMA Corporation.

34. From on or about October 1, 1973 up to and including December 31, 1973, Robert J. DeSalvo and Anthony Battista engaged in numerous telephone conversations.

35. On or about November 1, 1973, Robert J. DeSalvo moved the base of operations of AMMA Corporation from Plantation, Florida to Wilton Manors, Florida.

36. On or about November 26, 1973, Robert J. DeSalvo and Joseph Confora commenced doing business as Shore Distributors, 508 Warren, Springlake, New Jersey.

37. On or about November 26, 1973, Joseph Confora, acting on instructions from Robert J. DeSalvo, opened check-

ing account No. 58-411-8 in the name of Shore Distributors at First National State Bank of the Jersey Coast at Springlake, New Jersey.

38. On or about December 1, 1973, Robert Bernstein employed Willis J. Doebel and Richard Haes as representatives of AMMA Corporation in Des Moines, Iowa.

39. On or about December 5, 1973, at Wilton Manors, Florida, Ronald Kay falsely advised the United States Marshal seeking to serve a Grand Jury subpoena that he was unaware of the location of the base of operations for AMMA Corporation.

40. On or about December 3, 1973, Michael Cherubino deposited a $30,000 check to the account of Regal Enterprises at Commercial Bank of Hollywood, Hollywood, Florida.

41. On or about January 9, 1974, Michael Cherubino deposited a $15,000 check to the account of Regal Enterprises at Commercial Bank of Hollywood, Hollywood, Florida.

42. On or about January 16, 1974, Michael Cherubino deposited a $30,000 check to the account of Regal Enterprises at Commercial Bank of Hollywood, Hollywood, Florida.

43. On or about January 30, 1974, a $65,000 check payable to Haunted House was drawn on the account of Shore Distributors at the First National State Bank of the Jersey Coast at Spring Lake, New Jersey.

44. In February 1974, Robert Bernstein, acting for and on behalf of AMMA Corporation, made arrangements with Mel Friedman for "Deep Throat" to be exhibited at the Paris Theater, Memphis, Tennessee.

45. In approximately February 1974, Michael Cherubino and another male Caucasian, whose name is, as yet, to the Grand Jury unknown appeared in Memphis, Tennessee and engaged in conversation with Bob Lundry at the Lamar Theater, Memphis, Tennessee.

46. In approximately February 1974, William V. Mallozzi travelled from Memphis, Tennessee to Ft. Lauderdale, Florida and met with Robert J. DeSalvo and agreed to pay Robert J. DeSalvo a sum of money.

47. In February 1974, the motion picture film entitled "Deep Throat" was shown for public exhibition at the Studio Theater and the Lamar Theater in Memphis, Tennessee.

48. On or about April 1, 1974, Mario DeSalvo assumed supervisory control, on behalf of Robert J. DeSalvo, over Shore Distributors, 508 Warren Avenue, Spring Lake, New Jersey.

49. In April 1974, Robert J. DeSalvo published American Films as a fictitious business name to do business in Wilton Manors, Florida.

50. On or about June 1, 1974, Joseph Peraino assumed control of Shore Distributors, 508 Warren Avenue, Spring Lake, New Jersey.

51. In approximately June 1974, Michael Cherubino moved his residence from New York to Plantation, Florida.

52. On or about July 1, 1974, office space was rented by Robert Bernstein, acting on behalf of and in accordance with instructions from Robert J. DeSalvo, at 1800 North Highland, Los Angeles, California and employed Arnold Himmelstein as the representative of Robert J. DeSalvo at that location.

53. In October 1974, Robert J. DeSalvo formed a company doing business as Maines & Associates, Inc. in the State of Florida.

54. On or about January 5, 1975, Joseph Peraino closed the office of American Films and Maines & Associates, Inc. in Wilton Manors, Florida.

55. On or about January 7, 1975, Joseph Peraino opened checking account No. 0312-0430-154-108-5 in the name of Plymouth Distributors, Inc. at Ocean County National Bank, Point Pleasant, New Jersey.

56. On or about July 29, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167084 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000 payable to Caribbean Licensing, Ltd.

57. On or about August 12, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167735 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

58. On or about August 12, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167736 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

59. On or about August 14, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167838 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

60. On or about August 14, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167839 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

61. On or about September 3, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 168614 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

62. On or about September 27, 1974, at the direction of Robert J. DeSalvo, American Films puchased cashier's check No. 169664 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

63. On or about September 27, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 169665 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

64. On or about September 30, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 169789 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

65. On or about September 30, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 169790 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

66. On or about October 8, 1974, at the direction of Robert J. DeSalvo, Maines & Associates purchased cashier's check No. 170161 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $50,000, payable to Jordan Financial Investments, Inc.

67. On or about October 31, 1974, at the direction of Robert J. DeSalvo, Maines & Associates purchased cashier's check No. 171238 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $20,000, payable to Jordan Financial Investments, Inc.

68. On or about October 29, 1973, a check for $50,000, made payable to Haunted House was drawn on the account of AMMA Corporation at the American National Bank & Trust Company, Ft. Lauderdale, Florida.

69. On or about December 20, 1973, check No. 500 for $40,000, made payable to Haunted House was drawn on the account of AMMA Corporation at the American National Bank & Trust Company, Ft. Lauderdale, Florida.

70. On or about December 13, 1973, check No. 147 for $30,000, made payable to Regal Enterprises was drawn on the account of Shore Distributors at First National State Bank Of The Jersey Coast, Spring Lake, New Jersey.

71. On or about January 9, 1974, check No. 601 for $15,000, made payable to Regal Enterprises was drawn on the account of Shore Distributors at First National State Bank Of The Jersey Coast, Spring Lake, New Jersey.

72. On or about January 16, 1974, check No. 148 for $30,000, made payable to Regal Enterprises was drawn on the account of Shore Distributors at First National State Bank Of The Jersey Coast, Spring Lake, New Jersey.

73. On or about May 9, 1974, check No. 187 for $27,000, made payable to Regal Enterprises was drawn on the account of American Films at the Pan American Bank of Broward County, Florida.

74. On or about May 14, 1974, check No. 212 for $20,000, made payable to Regal Enterprises was drawn on the account of American Films at the Pan American Bank of Broward County, Florida.

75. On or about May 14, 1974, check No. 213 for $5,000, made payable to Regal Enterprises was drawn on the account

of American Films at the Pan American Bank of Broward County, Florida.

76. On or about June 1, 1974, check No. 179 for $5,000, made payable to Regal Enterprises was drawn on the account of American Films at the American National Bank & Trust Co., Ft. Lauderdale, Florida.

77. On or about June 18, 1974, check No. 196 for $5,000, made payable to Regal Enterprises was drawn on the account of American Films at the American National Bank & Trust Co., Ft. Lauderdale, Florida.

All in violation of Title 18, United States Code, § 371.

(nm $10,000, or nm 5 yrs., or both)

Office - Supreme Court, U.S.
FILED
OCT 14 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 81-14 and 81-416

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOUIS PERAINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ANTHONY BATTISTA AND T. ANTHONY ARNONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOHN C. WINKFIELD
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the evidence supported the jury's finding that petitioners were engaged in a single conspiracy to distribute an obscene movie in interstate commerce as alleged in the indictment.

2. Whether a national, as opposed to "community," standard is required when a defendant engages in a nationwide conspiracy to distribute a pornographic movie.

3. Whether venue is proper in a district to which a pornographic movie has been transported, even though the defendant, who was an active participant in the conspiracy to distribute the movie, lacked actual knowledge that the movie had been transported to that district.

4. Whether 18 U.S.C. 1462 and 1465 are impermissibly vague in violation of the First Amendment.

5. Whether the evidence supported the jury's finding that the movie "Deep Throat" is obscene.

6. Whether the district court improperly excluded from the record petitioners' educational slides depicting various sexual acts and improperly admitted into the record the government's expert testimony as to possible harmful effects of pornography on some members of society.

7. Whether a grand jury must view a movie before it can conclude that there is probable cause to believe that the movie is obscene.

8. Whether the district court erred in refusing to scrutinize all aspects of the grand jury proceedings once it concluded that the indictment on its face was proper.

9. Whether the district court erred in instructing the jury that contemporary community standards involved what the average person would "accept" as opposed to "tolerate."

10. Whether the district court erred in supplying the jury with two specific examples of how a defendant can demonstrate withdrawal from a conspiracy.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-14

LOUIS PERAINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 81-416

ANTHONY BATTISTA AND T. ANTHONY ARNONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals in both No. 81-14 and No. 81-416 (Pet. App. 1a-17a)[1] is reported at 646 F. 2d 237.

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[1]Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in *Louis Peraino, et al.* v. *United States of America*, No. 81-14.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1981. A petition for rehearing in No. 81-416 was denied on June 12, 1981 (Pet. App. 32a). The petition for a writ of certiorari in No. 81-14 was filed on July 2, 1981, and the petition in No. 81-416 was filed on August 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioners were convicted of conspiracy to violate 18 U.S.C. 1462 and 1465 by conspiring to transport the obscene motion picture film entitled "Deep Throat" in interstate commerce, all in violation of 18 U.S.C. 371. In No. 81-14, petitioner Louis Peraino was sentenced to a three-year term of imprisonment, with all but six months suspended, and he was fined $10,000; petitioner-corporations Gerard Damiano Film Productions, Inc., and Bryanston Distributors, Inc., were each fined $10,000. In No. 81-416, petitioner Anthony Battista was sentenced to two years' imprisonment, suspended to two months, and a $2,000 fine; and petitioner T. Anthony Arnone was sentenced to two years' imprisonment, suspended to five months, and a fine of $3,000. The court of appeals affirmed (Pet. App. 1a-17a).

The evidence showed that in approximately 1971 Gerard Damiano and petitioner Louis Peraino formed petitioner Gerard Damiano Film Productions, Inc. (Damiano Films), a New York corporation, to produce and distribute low budget sex films (J.A. 589-590).[2] One of the "sex" films

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[2] "J.A." refers to the joint appendix that was prepared by the parties for the court of appeals.

produced by the corporation was entitled "Deep Throat."[3] It was directed by Gerard Damiano[4] and produced by petitioner Peraino under the alias "Lou Perry" (J.A. 606, 611, 612, 619).

To facilitate the collection of royalties from the distribution and showing of "Deep Throat", petitioner Peraino used Damiano Films' sister corporation, petitioner Bryanston Distributors, Inc. (Bryanston), a New York corporation whose principal business was the distribution of "horror" movies and other general release films (J.A. 1205-1206). Peraino was the sole owner of Bryanston (J.A. 1202). After the middle of 1973, all royalties from "Deep Throat" were deposited in the Bryanston account and Bryanston paid the taxes of Damiano Films until the latter corporation was phased out in November 1973 (J.A. 953-958; 1034-1037).

Sometime during 1973, the distribution center for "Deep Throat" shifted from New York to Florida and a new corporation, AMMA, was created to distribute the film (J.A. 1302-1303). This corporation, which also was known as MGA and Ivanhoe, was owned jointly by petitioner

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[3]The plot of the movie involves an unmarried female, portrayed by Linda Lovelace, who consults a physician, portrayed by Harry Reems, regarding her inability to experience an orgasm during sexual intercourse. Upon examination the doctor discovers that the woman's clitoris is located in her throat instead of her vagina. Therefore, she can be satisfied sexually only through fellatio. The physician hires her as a therapist and sends her on house calls to treat men with sexual problems.

The film contains numerous scenes of fellatio, cunnilingus, vaginal and anal intercourse with male ejaculation. These acts are portrayed in detail, including close-ups centering on the sexual organs (J.A. 264; Pet. App. 36a).

[4]Damiano sold his one-third interest in Damiano Films in the summer of 1972 for approximately $15,000 (J.A. 619, 622). He testified at petitioners' trial under a grant of immunity (J.A. 586).

Arnone, Robert DeSalvo (a fugitive co-conspirator) and Anthony Peraino, petitioner Peraino's brother (J.A. 914, 1309-1315, 1760, 2204, 2215-2216, 2220-2221). In addition, petitioner Battista, who was primarily responsible for the distribution of "Deep Throat" in Pennsylvania, New Jersey and New York, was on AMMA's payroll and was listed as its President (J.A. 1310-1311; 1792-1793; 2204-2205). Tax returns also showed that petitioner Battista had received an automobile from AMMA (J.A. 1359, 1365-1366).

After the move to Florida, AMMA continued to maintain a relationship with petitioner Bryanston. Substantial sums of money were transferred from AMMA to a subsidiary of Bryanston, Haunted House Film Productions, Inc. (J.A. 964-967), and there were numerous telephone calls between officers of AMMA and Bryanston, many of which were placed to petitioner Peraino (J.A. 1606-1608). Indeed, a secretary at AMMA described Bryanston as an office of AMMA (J.A. 1762-1764, 1768). Moreover, prints of the film "Deep Throat" were sent from AMMA in Florida to Bryanston Distributors in New York (J.A. 1920-1921).[5]

Sometime in 1973, AMMA's office was moved from Plantation, Florida, to Wilton Manors, Florida, but petitioner Arnone did not move to the new location (J.A. 884-888; 896-897, 911). Apparently he and Robert DeSalvo

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[5]The corporate relationships are complex, but reveal a common enterprise as illustrated by the testimony of Pat Baca, the exhibitor of the film "Deep Throat" in Albuquerque, New Mexico. He originally paid royalties to petitioner Damiano Films from May 7, 1973, until April 1974. He then paid them to MGA, which was an alias for AMMA, from October to November 1973. He then paid directly to AMMA from November 26, 1973, to April 1974; and then to American Films from April to December 1974 (J.A. 830-836). The cancelled checks to Damiano Films revealed that they had been deposited to the account of petitioner Bryanston Distributors, Inc. (J.A. 957-958)

had a disagreement over how to run the operation (J.A. 1931). Arnone did continue, however, to exhibit the film in Florida (J.A. 1932).

With regard to the distribution of the movie, the evidence showed that prior to this Court's decision in 1973 in *Miller* v. *California*, 413 U.S. 15, "Deep Throat" was distributed in the same way as any other motion picture film, with prints stored at a film warehouse and shipped by common carrier to regional subdistributors or directly to theatre owners in various parts of the United States on the order of Damiano Films (J.A. 650-658). After *Miller*, prints generally were left in the states where they already were located, but, if the potential royalties seemed large enough, petitioners nevertheless risked shipping them in interstate commerce (J.A. 721-722, 788). This generally was accomplished by hiring "checkers" whose jobs were to carry prints of the film across state lines to theatres, count the number of people entering the theatres, collect the royalties from the theatre owners, and mail the receipts to petitioners or their co-defendants (J.A. 890-891, 907, 1144-1147).

Two stipulations by the parties clearly linked the conspiracy to the Western District of Tennessee. First, in October 1973, James Newman, an employee of Ivanhoe and AMMA, carried two prints of "Deep Throat" from Florida to Memphis, Tennessee, on instructions from Robert DeSalvo who was a co-partner in AMMA with petitioner Arnone. Newman left these prints in his hotel room and they were seized by FBI agents pursuant to a search warrant (J.A. 1573-1575). Second, in February 1974, an agent of AMMA and/or its successor corporation, American Films, made arrangements for "Deep Throat" to be exhibited in the Paris Theatre in Memphis. The movie was exhibited from February 21, 1974, through March 9, 1974 (J.A. 1157-1160).

On August 15, 1974, a federal grand jury in Memphis, Tennessee, returned a one-count indictment against all of

the petitioners, except Bryanston, and others for conspiring to violate 18 U.S.C. 1462 and 1465, by transporting "Deep Throat" in interstate commerce. This indictment was superseded on June 13, 1975, by an indictment issued by a new grand jury which recharged the above persons, added new defendants, including Bryanston, and added a substantive count against all of the defendants of knowingly transporting an obscene movie in violation of 18 U.S.C. 1465 and 2 (Pet. App. 3a-5a; J.A. 38-53).[6]

After pretrial motions had been disposed of, a jury trial was begun on March 1, 1976. On April 30, 1976, the jury found all the defendants guilty of conspiracy and some defendants, including petitioner Damiano Films, guilty of the substantive offense.

On appeal, the Sixth Circuit reversed the convictions of all defendants who had been sentenced because the instructions to the jury violated this Court's then-recent decision in *Pinkus* v. *United States*, 436 U.S. 293 (1978). The court of appeals remanded for new trials.

Prior to the re-trial the government dismissed the substantive count against all of the defendants and proceeded to trial only on the conspiracy count. The retrial of the petitioners and co-defendants lasted approximately seven weeks, with the United States calling 32 fact witnesses and one expert witness on the issue of whether the film was obscene as judged by contemporary community standards. The film was viewed by the jury at a local theatre in Memphis, Tennessee. Petitioners' proof consisted largely of expert witnesses and dealt with whether the movie "Deep Throat" was obscene.

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[6]Anthony Peraino, Robert DeSalvo and AMMA Corporation, who had been arraigned under the prior indictment, failed to appear as directed for their arraignments for the superseding indictment. They were tried *in absentia* for conspiracy as charged in the original indictment and found guilty. They have not, however, been sentenced.

During the course of the trial and prior to the court's charge to the jury, it was agreed and stipulated by all parties that a *Roth-Memoirs*[7] standard of obscenity incorporating the "benefits" of *Miller*[8] would be charged to the jury (J.A. 265). Subject to certain conditions in the written stipulation, the test agreed upon was as follows (J.A. 265-266):

A. Whether the average person, applying contemporary community standards, would find that the movie, taken as a whole, appeals to the prurient interest in sex; and,

B. Whether the movie is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters because it depicts or describes in a patently offensive way sexual conduct, that is:

(1) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and

(2) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals; and

C. Whether the movie is utterly without redeeming social value.

After three days of deliberation, the jury found all five petitioners guilty (J.A. 270-275).

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[7]This refers to the standards for judging obscenity announced by this Court in *Roth* v. *United States*, 354 U.S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

[8]This refers to this Court's decision modifying the standards for judging obscenity in *Miller* v. *California*, *supra*.

The court of appeals affirmed (Pet. App. 1a-17a).[9] It held that the grand jury proceedings had been proper and that, because the indictment was valid on its face, it had been unnecessary for the district court to probe into the grand jury proceedings at all (*id.* at 6a). It found ample evidence in the record to support the jury's findings on both conspiracy and obscenity (*id.* at 7a, 9a). It also concluded that the district court had committed no errors with regard to petitioners' objections to the admissibility of evidence (*id.* at 11a) or the instructions to the jury (*id.* at 12a-15a).

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Moreover, the judgment upholding the convictions of these five petitioners is correct. Accordingly, further review by this Court is not warranted.

1a. Petitioners in both petitions (81-14 Pet. 16-20; 81-416 Pet. 10-14) argue that there never was a national conspiracy to violate the obscenity laws and that the evidence showed at most a series of small, discrete conspiracies to distribute "Deep Throat" regionally. Petitioners thus claim that there was a fatal variance between the indictment and the proof at trial.

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[9]The Sixth Circuit wrote a separate opinion reversing the convictions of two of petitioners' co-defendants, Joseph Peraino and Plymouth Distributors, Inc. (645 F. 2d 548; Pet. App. 18a-30a). The court found that these defendants had joined the conspiracy after all overt acts in the Western District of Tennessee had been committed (*id.* at 19a). Also, it found that no overt acts were committed in any jurisdiction where the movie was regarded as obscene after these two defendants joined in the conspiracy (*id.* at 24a). In light of the potential First Amendment problems (*id.* at 23a-24a), the court concluded that, as to them, venue in the Western District of Tennessee was improper. This holding is discussed further at pages 11-12, *infra*.

The court of appeals correctly found, however, "that the indictment alleged only one conspiracy namely to transport an obscene film in interstate commerce" and that this single "conspiracy did not relate to merely one shipment to a particular place but was national in scope and related to many shipments made to different states" (Pet. App. 9a).

The jury was specifically instructed that if it found that more than one conspiracy existed, it was required to acquit all of the defendants (J.A. 2649). Although there was little direct evidence of a single agreement to distribute the movie "Deep Throat," the abundant circumstantial proof was easily sufficient to support the jury's verdict that only a single conspiracy existed. Petitioner Peraino and his brother, Anthony, participated, in one way or another, with every corporate entity that engaged in any substantial effort to distribute "Deep Throat" for exhibition.[10] Thus, it was quite reasonable for the jury to conclude that the operation moved from New York to Florida in furtherance of petitioners' scheme and then branched out through other conspirators with a singular purpose to distribute more widely this particular film. The fact that money passed freely among the various distributing corporations and their subsidiaries is persuasive evidence of a single, continuing scheme to profit from the nationwide distribution of the movie.

1b. Petitioners' related argument (81-14 Pet. 20; 81-416 Pet. 10-11) is that when a nationwide conspiracy to distribute an obscene movie is alleged, a national, as opposed

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[10]The government's view is that Anthony Peraino, petitioner Peraino's brother, was the central character in the conspiracy. He was involved in the making of the movie and in its distribution through Damiano Films. He was also the "boss" of AMMA and American Films once they assumed control of the distribution of the movie. He received substantial sums of money from these corporations derived from the nationwide distribution of this single film.

to community, standard for obscenity is required by the First Amendment. First, it is not at all clear why the obscenity standard stipulated to by the parties prior to trial—which expressly incorporates the "contemporary community standard" (J.A. 265)—does not bar petitioners' argument. Second, the same basic argument was rejected by this Court in *Hamling* v. *United States*, 418 U.S. 87, 104-106 (1974), with regard to prosecutions for the substantive offense of distributing an obscene movie in interstate commerce. See also *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 129-130 (1973). The Court in *Hamling* held:

> The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.

Hamling v. *United States, supra*, 418 U.S. at 106. Petitioners have suggested no reason why the same result should not obtain when the crime charged is conspiracy to distribute rather than actual distribution of obscene materials. The court of appeals' decision affirming the use of community standards in this case is correct.

1c. Petitioners make a more substantial objection in suggesting (81-14 Pet. 17-20; 81-416 Pet. 11-24) that it is inappropriate to subject everyone involved in a national conspiracy to distribute a pornographic movie to the contemporary community standards of the Western District of Tennessee and therefore venue in that district was improper. In an ordinary conspiracy case, venue is proper against all of the conspirators either in the district of the conspiracy's formation or in the district where any overt act in furtherance of the conspiracy takes place and this is so regardless of whether all of the conspirators participated in the act that serves as the basis for venue. *Hyde* v. *United States*, 225

U.S. 347 (1912); *Brown* v. *Elliott*, 225 U.S. 392 (1912); 18 U.S.C. 3237(a). See generally Developments, *Criminal Conspiracy*, 72 Harv. L. Rev. 920, 975-978 (1959). The theory is that if someone embarks upon a wide ranging criminal venture then he takes his chances as to where he might be prosecuted. See *United States* v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944) (L. Hand, J.).[11]

To be sure, this rule makes much more sense when the object of the conspiracy is the distribution of heroin, which is illegal everywhere, than it does when the object is pornography which may be constitutionally protected under the community standards of some localities. Nonetheless, the Sixth Circuit has held that "[o]nce the conspiracy to which they belonged was shown to have extended to and operated in Memphis, the defendants have no right to have the obscenity of the film tried according to the community standards of other localities * * *." *United States* v. *Sandy*, 605 F. 2d 210, 217, cert. denied, 444 U.S. 984 (1979). See also *United States* v. *Friedman*, 506 F. 2d 511, 516 (8th Cir. 1974).

Petitioners argue (81-14 Pet. 17-20; 81-416 Pet. 24-25) that the decision in the instant case relating to them conflicts with the Sixth Circuit's opinion overturning on improper venue grounds the convictions of two of their co-defendants. *United States* v. *Peraino*, 645 F. 2d 548 (6th Cir. 1981) (Pet. App. 18a-30a). In *Peraino* the court held that defendants could not be tried in Memphis because they had not joined the conspiracy until after all overt acts in the Western District of Tennessee had been committed. In addition, there was no evidence that the two defendants had

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[11]Recognizing the possibility of inconvenience to defendants occasioned by this rule, this Court noted in *Hyde* that it is preferable that "conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs." *Hyde* v. *United States*, *supra*, 225 U.S. at 363.

furthered the conspiracy in any locality where "Deep Throat" was allegedly obscene under community standards. The court therefore held that First Amendment concerns made it improper for them to be tried in Memphis (Pet. App. 22a-23a).

Even assuming the Sixth Circuit is correct—a point the government does not concede—that it is inappropriate in an obscenity case to apply the general rule that anyone who joins a conspiracy is responsible for all actions in furtherance of the conspiracy that occur prior to the time of joining, this holding does not assist petitioners. All the Sixth Circuit requires is a careful scrutiny of the nexus between the overt act that supports venue and the defendant. Only where no connection exists is venue inappropriate. All five petitioners, however, were sufficiently connected to the distribution into Memphis of the movie "Deep Throat" to support venue.

As to the three petitioners in No. 81-14, their role in the nationwide distribution of the movie would have supported trial in any location where the movie was introduced through the normal channels they established and perpetuated. The parties stipulated that the movie was shipped to Memphis by AMMA Corporation. AMMA was the successor to petitioners Damiano Films and Bryanston in the general distribution of the movie. The latter two corporations continued to benefit directly from the nationwide distribution of the film, which obviously included shipment to Memphis. Since the petitioner corporations placed the movie into the general stream of commerce and benefited financially from its distribution, they cannot complain about being prosecuted in a locality where the movie is found to be obscene. See *Hamling* v. *United States, supra,* 418 U.S. at 106.

The same reasoning applies equally to petitioner Peraino. He was the sole owner of Bryanston and Damiano Films

and played a significant role in the national distribution of "Deep Throat." Although he suggests that his role ended once the operation moved to Florida, the overwhelming evidence, involving numerous phone calls and exchanges of money, demonstrates that petitioner Peraino played a significant, continuing role in the general distribution of "Deep Throat" throughout the period of the conspiracy. Thus, venue over him in Memphis was perfectly proper. *Hamling* v. *United States*, *supra*, 418 U.S. at 106.

Petitioners in No. 81-416 present closer cases because they were less involved in the general distribution of the movie. They were, however, more involved with AMMA than they admit in their petitions. Petitioner Battista did not simply distribute in Delaware, New Jersey and Pennsylvania (Pet. 14). He was at least the titular President of AMMA and received money and a car from the corporation. Thus petitioner Battista was involved as a principal actor with the corporation that shipped "Deep Throat" in interstate commerce. He therefore knew or should have known that his corporation was distributing "Deep Throat" in localities where it might be considered obscene. This involvement is sufficient to support venue in the Western District of Tennessee.

Similarly, petitioner Arnone was not simply an exhibitor in Florida (Pet. 14), but rather was one of the managing partners of AMMA. He therefore benefited financially from the general distribution of that movie. Indeed, it was his partner, Robert DeSalvo, who ordered the movie sent to Memphis. Whether petitioner actually knew of this decision is irrelevant. He joined the conspiracy knowing its object was to ship a pornographic movie to exhibitors across the nation and therefore was properly prosecutable in any district where the movie was sent by AMMA, including Memphis.

Thus, even if the Court were inclined to regard as potentially important the issue of the relationship between the First Amendment and venue for conspiracy to violate the obscenity laws, this case involving defendants who were intimately related to the conspiracy as it extended to Memphis, Tennessee, is not an appropriate vehicle for resolving the issue.[12]

2a. Petitioners in No. 81-14 (Pet. 32-34) contend that 18 U.S.C. 1462 and 1465 are unconstitutionally vague both on their face and as applied in this case. Petitioners acknowledge (Pet. 32) that in *Marks* v. *United States*, 430 U.S. 188 (1977); *Miller* v. *California*, *supra*, 413 U.S. at 23-25; and *United States* v. *12 200-Ft. Reels of Film*, *supra*, 413 U.S. at 130 & n.7, this Court has upheld the federal obscenity statutes under the same First Amendment attacks. They nonetheless "persist" in their contention. No reason is offered, nor is any available, why the Court ought to reconsider its prior holdings.

Petitioners offer (Pet. 33-34) a novel theory with regard to the constitutionality of the statute as applied to this case. They point out that this Court, when it modified the obscenity standards to eliminate the "utterly without redeeming social value" test, quoted Justice Harlan's comment that he

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[12]Petitioners Arnone and Battista also complain (81-416 Pet. 23) that the court of appeals improperly defined the knowledge of the movie that the government was required to prove to convict them. The district court charged that the government must prove "knowledge as to the nature and character of the contents of the film, 'Deep Throat' " (J.A. 2680). The court of appeals held that the scienter required is "the general nature and character of the film" (Pet. App. 7a). Petitioners argue that this is inconsistent with *Hamling* v. *United States*, *supra*, 418 U.S. at 123, which requires knowledge of the nature, character and "contents" of the movie. Petitioners' argument is frivolous. Obviously, it is the nature and character of the contents of the movie that the Sixth Circuit was referring to. Moreover, the district court's instruction included the magic word "contents," and, accordingly, there was no error affecting the verdict.

doubted whether the test had any meaning at all. *Miller* v. *California, supra,* 413 U.S. at 22 (quoting *Memoirs* v. *Massachusetts, supra,* 383 U.S. at 459). Petitioners conclude that if the test applied to them had no meaning, then it could not possibly have given them notice of what was illegal and therefore is unconstitutionally vague.

Obviously, petitioners have turned Justice Harlan's point on its head. His statement was made in arguing in favor of a looser standard for "redeeming social value," such as that ultimately adopted in *Miller*. His view was that the test, if anything, was too clear in that it made only the most hard-core pornography subject to governmental regulation. As the court stated in *Hamling* v. *United States, supra,* 418 U.S. at 116:

> [W]e rejected the *Memoirs* "social value" formulation, not because it was so vague as to deprive criminal defendants of adequate notice, but instead because it represented a departure from the definition of obscenity in *Roth*, and because in calling on the prosecution to "prove a negative," it imposed a "[prosecutorial] burden virtually impossible to discharge" and not constitutionally required.

The fact that most materials would be protected under the *Memoirs* test, but that petitioners' movie was not, indicates less that the statute is vague than it does that the movie is unusually offensive.

2b. Petitioners' next argument (81-14 Pet. 25-32; 81-416 Pet. 16-20) is related to the previous one. They assert that, given the strictness of the *Roth-Memoirs* test for obscenity, it was impossible for the jury to find this movie obscene. We note initially that the issue of what is obscene under *Roth-Memoirs* is hardly an issue of general significance in light of the modification of those standards announced in the more recent *Miller* decision. It seems very unlikely that there will

be many more prosecutions under the old standards. Moreover, the issue is essentially a factual one that has been resolved by a jury after viewing the movie (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 (1973)) and upheld by the court of appeals, which has "[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction." *Hamling* v. *United States, supra*, 418 U.S. at 124. As the description of the movie (page 3 note 3, *supra*) illustrates, "Deep Throat" is not a movie like "Carnal Knowledge," at issue in *Jenkins* v. *Georgia*, 418 U.S. 153 (1974), where the Court felt compelled to overturn the jury's verdict because it did not depict any ultimate sexual acts. It is hard-core pornography and therefore a proper subject for a jury determination as to whether it violates community standards or has any redeeming social value. Review of those decisions by this Court is unwarranted.

3. Petitioners claim (81-14 Pet. 26, 28; 81-416 Pet. 16, 18) that the district court committed reversible error by allowing the government's witness to testify regarding the "harmful effects" of pornography and by refusing to allow a defense witness to show slides of various heterosexual acts that he regularly used in sex education programs in Memphis. This Court has recognized in a previous obscenity case that "the District Court ha[s] wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling* v. *United States, supra*, 418 U.S. at 108.

One of the petitioners' arguments at trial was that the movie, "Deep Throat," encouraged a healthy interest in sex (81-416 Pet. 17) and therefore ought not to be regarded as offensive or without redeeming social value. The testimony on "harmful effects" of pornography in general and "Deep Throat" specifically was designed to rebut those claims. The district court's decision to admit the evidence therefore was not error. For the same reasons, it was not error for the

district court to refuse to instruct the jury that it should disregard any possible harmful effects caused by "Deep Throat."

Nor was it error for the district court to refuse to admit petitioners' offer of "educational slides" as "comparable materials" evidence. After a lengthy hearing involving *voir dire* of the witness and culminating with the district court viewing the slides, the court found the slides not to be comparable to the movie "Deep Throat" (J.A. 2387-2438). Therefore, it held that they were not relevant to the issue of community standards. The district court's decision to exclude these slides as evidence was no abuse of discretion, as the court of appeals correctly found (Pet. App. 12a). *Hamling* v. *United States, supra,* 418 U.S. at 127.

4. Petitioners next contend (81-14 Pet. 21-25; 81-416 Pet. 14-16) that their First and Fifth Amendment due process rights were violated because of the way the grand jury proceedings were conducted, coupled with the district court's ruling preventing them from demonstrating that the grand jury indicted them on an inadequate factual basis. Specifically, petitioners first argue that it is per se impermissible for a grand jury to return an obscenity indictment without viewing the questioned film. Second, they argue that since the grand jury did not view the movie, the courts erred by not inquiring in detail into the grand jury proceedings to determine whether an adequate description of the film was provided.

The proof of the sexual content of the movie presented to the 1975 grand jury[13] was the sworn testimony of an FBI

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[13]This was the third grand jury convened to investigate petitioners' activities with regard to the distribution of "Deep Throat," and the second one to return an indictment based on a finding that the movie was obscene (J.A. 2952-2954). The first two grand juries traveled to a theatre in Memphis to view the movie but the second jury watched only for ten to fifteen minutes before the members decided they had seen

agent who had witnessed the film and taken meticulous notes.[14] He described the movie scene-by-scene for over thirty minutes. The grand jury foreman, who had seen the movie, "couldn't think of anything that wasn't included" (J.A. 3000). While this evidence clearly would not have been sufficient at trial, the fact that it was not the best evidence available does not undermine a grand jury finding of probable cause. See *Costello* v. *United States*, 350 U.S. 359, 363 (1956). This is especially so where, as here, members of the grand jury had independently seen the movie and verified that the description was accurate. Cf. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959).

Nor was there reason for the district court to require the prosecutor to make a more extensive showing as to what transpired before the grand jury. Both the district court and court of appeals found that this indictment was valid on its face. In such a situation this Court has made clear that the indictment "is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) (citing *Costello* v. *United States, supra; Holt* v. *United States*, 218 U.S. 245 (1910)). Thus, to the extent there was any error, it was committed when the district court breached the secrecy of the grand jury by requiring the foreman to testify, even though petitioners had made no particularized showing of need to invade the processes of

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enough (*ibid.*). Although the record is not clear, it appears the government chose to describe the movie to the third grand jury to save the time and expense required to take the grand jury to a movie theatre to view a film for potentially as short a period as ten minutes.

[14]The district court conducted a hearing to ascertain what evidence had been presented to the jury. One of the witnesses was the foreman of the 1975 grand jury (J.A. 2979-3006).

the grand jury. *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681-682 (1958). Since this error benefited petitioners, however, it obviously was harmless.

5. Petitioners Arnone and Battista contend (81-416 Pet. 20-23) that the district court erred in declining to charge the jury that contemporary community standards should be judged by what the community would "tolerate" as opposed to "accept" or "approve." The district court instructed the jury on community standards in the following terms (J.A. 2669):

> Contemporary community standards are set by what is in fact accepted in the community as a whole; that is to say, by society at large or people in general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept.

The court of appeals (Pet. App. 12a-15a) upheld the instruction as an accurate statement of the appropriate standard and as consistent with the emphasis in this Court's decision in *Miller* v. *California, supra,* and *Jenkins* v. *Georgia, supra,* on the "average person." The court of appeals basically held that use of "tolerance" might focus the jury's attention more on individual groups in the community rather than on the average person. This holding is consistent with this Court's approach to obscenity and does not conflict with any decision of any other court. Thus, even though the Court has not expressly decided this issue, there is no need to take it up in this case.[15]

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[15] *Smith* v. *United States*, 431 U.S. 291 (1977), relied upon by petitioners (81-416 Pet. 21), holds that federal standards and not state standards control the substantive content of the federal obscenity laws, which effectively makes irrelevant petitioners' claim that under Tennessee law the standard might have been what the community would tolerate as opposed to accept.

The other cases cited by petitioners deal with the standards under state obscenity laws. Obviously, each state is permitted to adopt any

6. Finally, petitioner Arnone contends (81-416 Pet. 25-28) that the district court's instruction on withdrawal from the conspiracy was erroneous and constituted reversible error. He argues (Pet. 26) that the two examples of withdrawal that the district court incorporated into the withdrawal instruction were unduly limiting and tended to make the jury "believe that only such dramatic conduct will constitute relevant evidence of withdrawal" in violation of this Court's ruling in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 (1978).

The instruction in its entirety was as follows (J.A. 2650-2651):

> A defendant claiming that he has withdrawn from any conspiracy which the prosecution may have proven him to be a part, must show, in order to sustain the claim of withdrawal, that he has either taken some affirmative action to disavow or defeat the purpose of the conspiracy, or has taken some definite and decisive step to disassociate himself fully and completely from the conspiracy. For example, a defendant may withdraw by making a clean breast to the authorities, or by communicating to his co-conspirators his abandonment of the conspiracy by some effective means. A mere end to activity is not enough.

This instruction does not violate *United States Gypsum Co.* In that case the Court made a special point of focusing on the fact that the instruction presented the examples in an

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appro. h it chooses, consistent with the Constitution, to regulate obscenity within the state. The fact that some prefer to consider what the community will "tolerate" as the better approach as a matter of policy is in no way inconsistent with the Sixth Circuit's decision that what the community will accept is most consistent with the "average person" standards enumerated in *Miller* v. *California, supra.*

"either/or" form (438 U.S. at 463-464) and therefore "limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy." *Id.* at 464. In the instant case, the instruction properly indicated that petitioner was required to prove some "affirmative action" (J.A. 2650) and simply provided the jury with explanatory illustrations. The jury was not precluded from considering any theory of withdrawal petitioner might offer involving other, more or less dramatic, affirmative acts. The instruction read in its entirety is not inconsistent with *United States Gypsum Co.*

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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